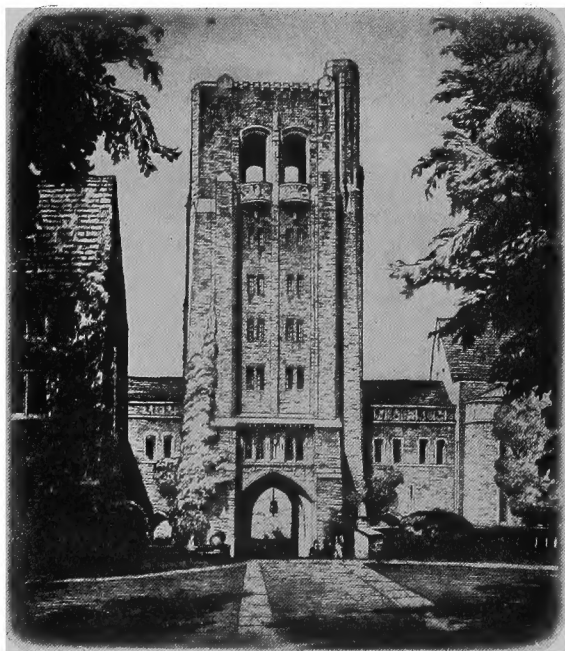


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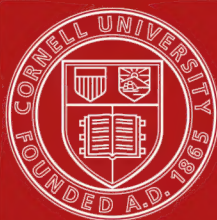
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LAW OF PERSONAL PROPERTY,

INTENDED FOR
THE USE OF STUDENTS IN CONVEYANCING.

BY
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SECOND AMERICAN

FROM THE
SECOND ENGLISH EDITION.

With Notes and References to the Latest American Decisions.

BY
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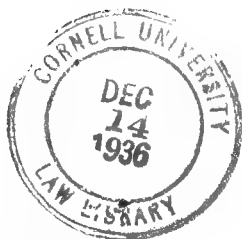
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PREFACE

TO THE FIRST EDITION.

THE following pages are intended as supplementary to the author's "Principles of the Law of Real Property." At the time when that work was written, the plan of the present treatise was not matured, and a chapter "On Personal Property and its Alienation" was inserted in that work. The contents of that chapter will be found interspersed in parts of the present volume; and should a second edition of the Principles of the Law of Real Property be called for, it is the author's intention to omit that chapter of his former work, and to supply its place by some further remarks on such elementary parts of the law of real property as may appear to have been but slightly touched upon before. The very favorable reception which the author's work on the law of real property has met with from the profession, has encouraged him to undertake in the present work a task, he believes, hitherto unattempted: for it is singular that, notwithstanding the rapid growth and now enormous value of personal property in this country, no treatise has yet appeared having for its object the introduction of the student in conveyancing to that large and increasing portion of his study and practice which comprises the law relating to such property. As to real property he may take his choice amongst three or four publications, all having the same object of facilitating his studies; but the law of personal property, though sufficiently treated of in all that relates to it as purely mercantile, has not yet had any elementary treatise on its principles, so far as they affect the practice of conveyancing. The present work is an attempt to supply this deficiency,

and, in conjunction with the author's Principles of the Law of Real Property, to afford the student a brief and simple introduction to the whole system of modern conveyancing. The novelty of the attempt has, however, increased the difficulty of the task. The author has endeavoured proportionably to increase his diligence and care. He can, however, scarcely hope to have escaped all errors. And here he would caution the student against too implicit a reliance on the dicta of text books. Elementary books cannot from their nature be completely accurate. As helpers to more perfect knowledge, they may be most valuable. But it would be as great a mistake for a student to remain satisfied with his knowledge of a text book, as for an author to compress into an elementary work all that could possibly be said on the subject.

7, NEW SQUARE, LINCOLN'S INN, 23rd May, 1848.

PREFACE

TO THE AMERICAN EDITION.

THE object of the editors of the present edition of this work has been to accommodate Mr. Williams' Treatise to the United States, by incorporating in the notes the American law; they have also occasionally cited and discussed the English law. They have endeavored to make the book useful to the American profession, both as an elementary composition for the student, and as a book of reference for the practitioner. The editors have rarely indulged in original researches, but it will be sufficient proof of their industry, to state that more than thirty-five hundred cases have been referred to in their notes, and in almost every instance where a citation has been made, the original book has been consulted, and when practicable, the opinions of the Judges have been quoted rather than the syllabus of the reporter of their decisions, or any abstract of such judgments. An index of the American cases, and of the additional English authorities referred to in the notes to this edition, accompanies the book, by which any decision cited in those notes may be readily found.

If it be true, as the author modestly tells his readers in the preface to the first edition of his work, that no text book of the law can be completely accurate, how very much less must be the approach to perfection by annotators.

With this brief introduction the editors submit their labours to the profession—should they prove useful, the object had in view will have been attained.

PHILADELPHIA, *Aug. 13th*, 1855.

ADVERTISEMENT

TO THE SECOND EDITION.

IN this edition the alterations which have taken place in the law since the publication of the first edition have been incorporated in the text. The Chapters on Bankruptcy and on Letters-Patent have been almost entirely re-written, and several additional references have been made throughout to recent cases and statutes.

7, NEW SQUARE, LINCOLN'S INN, 1st *January*, 1853.

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PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY.

NOTICE.—Volumes of Reports to which a star (*) is annexed, have been reprinted by T. & J. W. Johnson in the English Common Law and the Exchequer Reports.

INTRODUCTORY CHAPTER.

OF THE SUBJECTS AND NATURE OF PERSONAL PROPERTY.

THE English law of property is divided into two great branches,—the law of real property, and the law of personal property. The feudal rules, which respected the holding and culture of land were the elements of the common law of real property; the rules relating to the disposition of goods were the origin of the law of personal property. Such property was anciently of little importance, and its laws were consequently few and simple. It did not, however, escape the ecclesiastical influence which spread so widely in the middle ages; and it has thence derived that subjection to the rules of the civil law by which it is characterized when transmitted by will or distributed on intestacy.

The division of property into real and personal, though now well recognized, and constantly referred to even in the acts of the legislature, is comparatively of modern date. In ancient times, property was divided into *lands tenements and hereditaments* on the one hand, and *goods *and chattels* on the other. These two last terms [*2] appear to be synonymous. In process of time, however, certain estates and interests in land grew up, which were unknown to the ancient feudal system, and could not conveniently be subjected to its

rules. Of these the most important were leases for years (1). Such interests, therefore, were classed amongst chattels; but as they savored, as it was said, of the realty, they acquired the name of *chattels real* (a). In more modern times, chattels real have been classed, with other chattels, within the division of personal property, but as chattels real, though personal property, are in fact interests in land, the laws respecting them have been noticed in the author's treatise on the Principles of the Law of Real Property (b). Chattels real will therefore be only incidentally noticed amongst the subjects treated of in the present work.

When leases for years, and other interests in land of the like nature, were admitted into the class of chattels as chattels real, it became necessary that such goods as had previously constituted the whole class, should be distinguished from them by some further name; and the title of *chattels personal* was accordingly applied to all such chattels as did not savor of real estate. For this title, the choice of two reasons is given to the reader by Sir Edward Coke, "because, for the most part, they belong to the person of a man, or else for that they are to be recovered by personal actions (c)." (2) The former of these two

(a) Co. Litt. 118 b.

(b) Principles of the Law of Real Property, 315 et seq., 1st ed.; 307, 2d ed.

(c) Co. Litt. 118 b.

(1) A lease for any number of years is, in the common law, of no higher dignity than a lease or term for one year. Both are mere chattels and pass to the personal representatives of a decedent. 7 Smedes & Marshall's R., p. 479. Gay's case, 5 Mass. R., 419; Reynold's heirs v. Com'rs. of Stark Co., 5 Ohio R., 204; Lessee of Bisbee v. Hall, 3 O. R., 499; Brewster v. Hill, 1 N. Hamp. R., 351. In Massachusetts by the revised statutes of 1835, it is declared that the lessees and assignees of lessees of real estate, for the term of one

hundred years or more, in cases where there is an unexpired residue of fifty years or more of the term, shall be regarded as freeholders, and the estate subject like freehold estates to descent, devise, dower, and execution. In Ohio, Revised Statutes, 1836, p. 411, permanent leasehold estates, renewable forever, are subject to the same law of descent and distribution as estates in fee. See Northern Bank of Kentucky v. Roosa, 13 Ohio R., 334.

In relation to terms to attend the inheritance although on the death of the ancestor, the legal title to these vests in his personal representatives, yet in equity they belong to the heir and are considered part of the inheritance. Lovet v. Needham, 2 Vern. 138; Whitchurch v. Whitchurch, 2 P. Wms. 236; Villiers v. Villiers, 2 Atkins, 71.

(2) However unimportant any discussion may be as to the origin of the term personal as ascribed to chattels, it is conceived that the reason of the designation as given by Blackstone, is the correct one. All chattels formerly known to the law were by their nature moveable, and a

reasons has been chosen by Mr. Justice Blackstone (*d*). But it is submitted that the latter reason is most probably the true one. When goods and chattels began to be called personal, they had become too numerous and important to accompany the *persons of their [*3] owners. On the other hand, the bringing and defending of actions has always been the most prevailing business of lawyers; from the different natures of actions the nomenclature of the law is therefore most likely to have proceeded. Now actions were long divided into three classes,—real actions, personal actions, and mixed actions. Real actions were brought for the recovery of lands, and by their aid, the *real land* was restored to its rightful owner. Mixed actions, as their name imports, were real and personal mixed together. Personal actions were brought in respect of goods, for which, as they are in their nature destructible, nothing but pecuniary *damages* could with certainty be recovered from the *person* against whom the action was brought. Accordingly, by the law of England, there never have been more than two kinds of personal actions in which there has been a possibility of recovering, by the judgment of the court, the identical goods in respect of which the action is brought. One of these is the action of *detinue*, where goods, having lawfully come into a man's possession, are unlawfully detained by him; in which case, however, the judgment is merely conditional, that the plaintiff recover the said goods, or (*if they cannot be had*) their respective values, and also the damages for detaining them (*e*). The other is the action of *replevin*, brought for goods which have been unlawfully distrained; but in this case the goods have never been beyond the custody of the sheriff, who is an officer of the law, and their safe return can therefore be secured (*f*)(1).

(*d*) 2 Black. Com. 16, 384; 3 Black. Com. 144.

(*e*) 3 Black. Com. 152.

(*f*) Ibid. 146.

very large class of them, such as debts, obligations, and the like, had no tangible existence, and were supposed by the law to "attend the person," and are subject to the incidental laws of the domicile of the owner, in the case of intestacy and insolvency, while real estate being immoveable, is only governed by the laws of the place where it is situated, independently of the actual domicile of the owner. This, would seem to be a more probable reason than the mere fact of their being the subject of actions called personal.

(1) In the United States generally, the action of replevin lies, wherever one claims goods in the possession of another, (see post), and on a claim of property, the defendant can retain the goods if he gives security to produce them; but even in England it was not formerly the case, as is stated in the text, that the goods were in the custody of the sheriff. 1 Saund. (by

Goods therefore seem to have been called personal, because the remedy for their abstraction was against the *person* who had taken them away, or because, in the words of Lord Coke, they were to be recovered by personal actions (*g*).

(*g*) See Principles of the Law of Real Property, 7.

Williams) 347 *a*, note 2. See also 12 Mass. R., 180, note.

In New York, replevin lies for any *tortious* taking of goods. *Pangburn v. Partidge*, 7 Johns. R., 140; *Gardner v. Campbell*, 15 Id. 402; *Mills v. Martin*, 19 Id. 31; *Clark v. Skinner*, 20 Id. 467; *Judd v. Fox*, 9 Cow. R., 259.

But it will not lie for illegal detention of property, where the party comes to possession by delivery from a person having a special property in the goods. *Marshall v. Davis*, 1 Wendell's R., 109.

In Pennsylvania, wherever one man claims goods in the possession of another, replevin will lie. *Weaver v. Laurence*, 1 Dall. R., 157; *Shearick v. Huber*, 6 Binn. R., 3; *Stoughton v. Rappalo*, 3 Serg. & Raw. R., 562; *Snyder v. Vaux*, 2 Raw. R. 428; *Pearce v. Humphries*, 14 Serg. & Raw. R., 25; *Bower v. Tallman*, 5 Wat. & Serg. R., 561; *Harlan v. Harlan*, 3 Har. R., 513. But it will not lie by one claiming land against another in the actual adverse possession thereof, under claim of title for fixtures, aliter, where there is no claim of adverse title. *Mather v. Trin. Church*, 3 Serg. & Raw. R., 509; *Bowen v. Caldwell*, 10 Id., 114; *Harlan v. Harlan*, 15 Har. R., 513.

In Massachusetts, it has been held that as a general principle the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it be in the custody of the law, or, unless it had been taken by replevin from him, by the party in possession. *Ilseley v. Stubbs*, 5 Mass. R., 280. In order to maintain it, the plaintiff must have the right of property and of possession, at the time of taking or of suing out his writ. *Wheeler*

v. Train, 3 Pick. R., 255; *Walcot v. Pomeroy*, 2 Id. 121. But where goods which had been leased by the owner, were attached as the property of the lessee while they were in his possession under the lease, and the owner replevied them from the officer, and before judgment the lease expired, the defendant had judgment for costs only, and not for a return. *Wheeler v. Train*, 3 Pick. R. 255. If goods be obtained by means of false and fraudulent pretences, the owner of the goods may reclaim them by this action. *Buffington v. Gerrish*, 15 Mass. R., 156. So replevin will lie for goods which are unlawfully detained, though the taking be lawful. *Badger v. Phinney*, 15 Mass. R., 359; *Baker v. Fales*, 16 Id. 147; *Marston v. Baldwin*, 17 Id. 606. [*Contra*, *Meany v. Head*, 1 Mason's R., 319.] And when goods are delivered in pursuance of a conditional sale, and the condition is not performed, the vendor may reclaim the goods by this action. *Marston v. Baldwin*, 17 Mass. R., 606.

But if the property is not in the plaintiff at the time of the taking, or if he then had no right to the possession against the defendant, replevin cannot be maintained, unless a demand has been made upon the defendant by the plaintiff for the chattels, since he acquired the property in them. *Gates v. Gates*, 15 Mass. R., 310. Such a demand, however, will be sufficient if made on the day of the date of the writ, before it is served, although after its delivery to an officer. *Badger v. Phinney*, 15 Mass. R., 359.

Replevin will not lie by one joint owner of a chattel, but the objection can only be taken by a plea in abatement where he sues for the whole. If he sues for a moiety

*Chattels personal, then, are the subject of the present treatise. [*4] In ancient times they consisted entirely of moveable goods, visible and tangible in their nature, and in the possession either of the owner or of some other person on his behalf. Nothing of an incorporeal nature was anciently comprehended within the class of chattels per-

the court will abate the writ *ex officio*. *D'Wolf v. Harris*, 4 Mason's R., 515. And by the same case it was held that an assignment of goods at sea and their proceeds, if *bona fide*, is sufficient to pass the legal title to the goods, and also to the proceeds, so that replevin will lie for the latter.

In Pennsylvania, if trees cut down be converted by defendant into rails and posts, this is not such an alteration of the property as will prevent recovery in replevin. *Snyder v. Vaux*, 2 Rawle's R., 423.

In Maine, replevin may be maintained for goods unlawfully detained, though the taking was lawful. *Seaver v. Dingley*, 4 Greenleaf's R., 306.

In New Jersey, where goods are so taken as to entitle the owner to an action of trespass, replevin can be maintained. *Bruen v. Ogden*, 6 Halst. R., 370; or, for goods taken and unlawfully detained. *Elmer's Dig.* 466.

In Ohio, replevin lies in all cases unless excepted by statute. *Stone v. Wilson*, *Wright's R.*, 159.

In Indiana, demand may be necessary where the defendant has goods by license of the plaintiff; but, where there is a wrongful possession of goods, as where they were obtained by fraud, force, or otherwise without the owner's consent, no demand need be made. 8 Blackf. R., 244.

In Delaware, it may be used wherever one claims personal property in possession of another. *Clark v. Adair*, 3 Har. R., 113. A purchaser at sheriff's sale may maintain replevin after demand and refusal. 16 Id., 62.

In Maryland, replevin lies in all cases where the plaintiff seeks to try the title to

personal property, and recover its possession. *Brooke v. Berry*, 1 Gill's R., 163.

In Kentucky, it will not lie to recover goods held adversely to plaintiff. *Dillon v. Wright*, J. J. Marsh. R., 10. Nor where the legal title is not in the plaintiff. *Daniel v. Daniel*, 6 B. Mon. R., 231.

In Missouri, replevin will lie for goods unlawfully taken or detained when trespass will. *Skinner v. Stouse*, 4 Mo. R., 93; *Crocker v. Man*, 3 Mo. R., 345, 472.

In Tennessee, to support replevin, the plaintiff must show right of possession as against the defendant. *Bogard v. Jones*, 9 Hump. R., 739; *Bradley v. Mitchell*, 1 Smith's R., 346.

In Arkansas, under the Revised Statutes (same as that of New York on replevin) replevin may be maintained for an unlawful taking or detention of a chattel, but the plaintiff must show title. *Beebe v. De Baun*, 3 Eng. R., 566; *Rev. Stat.*, 695. The owner of property may bring replevin against a purchaser, where his property has been sold under execution against a third person. 3 Eng. R., 83. As in New York, possession of chattels and actual wrongful taking by defendant, will support replevin. It may be brought wherever trespass *de bonis asportatis*, will lie. *Trappall v. Hattier*, 1 Eng. R., 21.

In Virginia, replevin is confined by statute (1823) to cases of distress for rent. 1 Robinson's Pr., 408.

As also in Mississippi. *Wheelock v. Cozzens*, 6 Howard's R., 279.

The writ lies in Michigan and Illinois by statute, for goods wrongfully taken or detained. Territorial Act of Michigan, April 4, 1833; *Rev. Laws of Illinois*, edit. 1833, p. 508.

sonal. In this respect the law of personal property strikingly differs from that of real property, in which, from the earliest times, incorporeal hereditaments occupied a conspicuous place. But although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong, or the nonperformance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman French of our early lawyers, a *chose* or thing *in action*, whilst moveable goods were denominated *choses in possession*. Choses in action, though valuable rights, had not in early times the ordinary incident of property, namely, the capability of being transferred; (1) for, to permit a transfer of such a right was, in the simplicity of the times, thought to be too great an encouragement to litigation (*h*); and the attempt to make such a transfer involved the guilt of *maintenance* or the maintaining of another person in his suit. It was impossible, however, that this simple state of things should long continue. Within

(*h*) 10 Rep. 48 a.

(1) A right of action for a tort is not assignable. *Gardner v. Adams*, 12 Wend. R., 297; *Com. v. Tuqua*, 3 Litt. R., 41; *Comegys v. Vasse*, 1 Peter's R., 213; *People v. Tioga*, 19 Wend. R., 73.

The general rule is that personal torts which die with the party and do not survive to personal representatives, are incapable of passing by assignment. *Comegys v. Vasse*, 1 Peter's R., 193; *North v. Turner*, 9 Serg. & Raw. R., 244; *Sommers v. Wild*, 4 Id., 19; *O'Donnell v. Seybert*, 13 Id., 54.

But other choses of action may be assigned in equity. *Dix v. Cobb*, 4 Mass. R., 511; *Parker v. Grout*, 11 Id., 157, note; *Wheeler v. Wheeler*, 9 Cow. R., 34; *Eastman v. Wright*, 6 Pick. R., 316; *Welch v. Mandeville*, 1 Wheat. R., 236; *Brackett v. Blake*, 7 Metc. R., 335; *Fletcher v. Pratt*, 7 Blackf. R., 522; *Powell v. Powell*, 10 Ala. R., 900; *Wooden v. Butler*, 10 Miss. R., 716; *Blier v. Pierce*, 20 Vt. R., 25; 26 Maine R., 448; *Merriweather v. Herran*, 8 B. Mon. R., 162; 29 Maine R., 9; *Kerr v. Day*, 2 Har. R., 212; *Anderson v. De*

Soer, 6 Gratt R., 363; *Ensign v. Kellogg*, 4 Pick. R., 1; *Champion v. Brewer*, 6 Johns. Chan. R., 398; *Lowry v. Tew*, 3 Barbour Ch. R., 407; *Mitchell v. Manufacturing Co.*, 2 Story's R., 660; *Calkins v. Lockwood*, 14 Conn. R., 226.

A contingent debt may be assigned in equity; *Crocker v. Whitney*, 10 Mass. R., 316, and a judgment and execution; *Dunn v. Snell*, 15 Mass. R., 481; *Allen v. Holden*, 9 Id., 133; *Brown v. Maine Bk.*, 11 Id., 153; *Pearson v. Talbot*, 4 Litt. R., 435; *Vanhouten v. Reilly*, 6 Smedes & Marsh R., 440.

To make an assignment valid at law, that which is the subject of it, must have an existence actual or potential at the time of assignment. *Mitchell v. Winslow*, 2 Story's R., 630.

An interest created by a pledge of personal property can be assigned. *Russell v. Fillmore*, 15 Vt. R., 130.

The legal interest in a judgment, is not assignable, either by statute or common law. *Richardville v. Cummins*, 5 Blackf. R., 48.

the class of choses in action was comprised a right of growing importance, namely, that of suing for money due, which right is all that constitutes a *debt*. That a debt should be incapable of transfer was obviously highly inconvenient in commercial transactions; and in early times the customs of merchants rendered debts secured by bills of exchange assignable by indorsement and delivery of the bills. But choses ^{*in} action, not so secured, could only be sued for by the original creditor, or the person who first had the right of action. [*5] In process of time, however, an indirect method of assignment was discovered, the assignee being empowered to sue in the name of the assignor; and in the reign of Henry VII. it was determined that "a chose in action may be assigned over for lawful cause as a just debt, but not for maintenance, and that where a man is indebted to me in £20, and another owes him £20 by bond, he may assign this bond and debt to me in satisfaction, and I may justify for suing it *in the name of the other at my own costs (i)*" (1). Choses in action, having now

(i) Bro. Abr. tit. Chose in Action, pl. 3, 15 Hen. VII. 2.

(1.) The assignee of a chose in action, has an equitable right, enforceable at law in the assignor's name. *Dix v. Cobb* 4 Mass. R. 511; *Parker v. Grout* 11, Id. 157, note; *Wheeler v. Wheeler*, 9 Cow. R. 34; *Eastman v. Wright*, 6 Pick. R. 316; *Welch v. Manderville*, 1 Wheat. R. 236; *Hendrick v. Glover*, Geo. Decis. part 1, 63; *Marcune v. Hereford*, 8 Dana's R. 1; *Dunklin v. Wilkins*, 5 Ala. R. 109; *Rawson v. Jones*, 1 Scam. R. 291; *Van Houten v. Reily*, 6 Smedes & Marsh. R. 440; *Broughten v. Badgett*, 1 Kelly's R. 75; *Sims v. Radcliffe*, 3 Rich. R. 287. But the assignee of a bond cannot, at common law, sue thereon in his own name. *Skinner v. Somers*, 14 Mass. R. 107; *Smock v. Taylor*, Cox's R. 177; *Sheppard v. Stites*, 2 Halst. R. 94; *Sayre v. Lucas*, 2 Stew. R. 259.

The bearer of a negotiable promissory note may sue on it in his own name. *Mauran v. Lamb*, 7 Cowen's R. 174; *Pearce v. Austin*, 4 Wharton's R. 489; *Barbarin v. Daniels*, 7 Louis. Rep. 481; *Denton v. Duplessis*, 12 Id. 92. *Hill v. Holmes*, Id. 96; *Story on Prom. Notes*, 465; *Rankin v. Woodworth*, 2 Watt's R. 134; *Leidy v. Tammany*, 9 Id. 353.

If a negotiable note be assigned and delivered, for a valuable consideration, without indorsement, the title passes, and the assignee may recover in the name of the payee. *Jones v. Willett*, 3 Mass. R. 304.

A right to property held adversely, or a right growing out of an executory contract, is unsusceptible of legal assignment. *Greely v. Wilcocks*, 2 Johns. R. 1.

An obligation of record, or under seal, may be equitably assigned by a writing, unsealed. *Dunn v. Swell*, 15 Mass. R. 485; *Dawson v. Coles*, 16 Johns. R. 51; or by parol, *Ford v. Stuart*, 19 Johns. R. 342; *Jones v. Witter*, 13 Mass. R. 304; *Lacey v. Lacey*, 7 Barr's R. 251.

In Pennsylvania, the assignees of bonds, specialties and notes, can sue in their own names, by statute. *Purdon's Dig.*, (edit. 1847,) p. 144.

In New Jersey, the assignee of a bond may maintain an action thereon in his own name. *Bennington Iron Co. v. Rutherford*, 3 Harr. R. 158. And the assignment need not be in writing; *Allen v. Pancoast*, 1 Spencer's R. 68.

In Missouri, by the Rev. Stat., 1853, 105, the assignees of bonds may sue in

become assignable, became an important kind of personal property; and their importance was increased by an act of the following reign (*k*), whereby the taking of interest for money, which had previously been unlawful, was rendered legal to a limited extent. Loans and mortgages soon became common, forming a kind of incorporeal personal property unknown to the ancient law. In the reign of Queen Anne, promissory notes were rendered, by act of parliament, assignable by indorsement and delivery in the same manner as inland bills of exchange (*l*). But other choses in action continue to this day assignable at law only by empowering the assignee to sue in the name of the assignor.

In addition to the mass of incorporeal personal property, which now exists in the form of choses in action recoverable by action at law, there exist also equitable choses in action, or rights to be enforced by suit in equity; of these a pecuniary legacy is a familiar instance, for which, if the executor withhold payment, the legatee can maintain no [*6] action at law (*m*)(1), but must either proceed* in the Ecclesiastical Court, or bring a suit in equity. This kind of chose in action

(*k*) Stat. 37 Hen. VIII. c. 9.

(*l*) Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25, s. 3.

(*m*) *Deeks v. Strutt*, 5 T. Rep. 690; *Braithwaite v. Skinner*, 5 Mee. & Wels. 313.* Legacies under fifty pounds may now be recovered in the county courts under the acts for the more easy recovery of small debts and demands in England, unless the validity of the bequest be disputed. Stats. 9 & 10 Vict. c. 95, ss. 58, 65; 13 & 14 Vict. c. 61.

their own names, but the assignment must be in writing. *Miller v. Paulsell*, 8 Mo. R. 355.

In Mississippi, the statute making bonds, bills single, &c., assignable by indorsement, so that the assignee may maintain an action in his own name, does not require the indorsement to be under seal. 3 *Smedes & Marsh. R.* 647.

In Arkansas, (under the statute) an action upon an assigned bond *must* be brought in the name of the assignee. *Block v. Walker*, 2 Pike's R. 4; *Gamblin v. Walker*, 1 Id. 220.

In South Carolina, the assignee of a bond is not compelled to sue in his own name, under the statute. *Coachman v. Hunt*, 2 Rich. R. 450.

In Ohio, the holder of bonds payable to

order or bearer, can sue in his own name. *Logue, v. Smith*, Wright's R. 10.

In Illinois, the legal interest in a bond, can only be transferred by indorsement in writing, and an action can only be maintained in the name of the person who has such legal interest. *Chadsey v. Lewis*, 1 Gilman's R. 153.

(1) An action at law for a pecuniary legacy, has been maintained in some of the States, and in some, is expressly given by statute. 3 Barb. Ch. R; 466. *Beeker v. Beeker*, 7 John. R. 99; *Farwell v. Jacobs*, 4 Mass. R. 634; *Pettigrew v. Pettigrew*, 1 Stew. R. 580; *Morrow v. Brenizet*, 2 Rawle R. 185. *App v. Driesbach*, Id. 301. In Mississippi, a specific legacy may be recovered by an action at law. *Wooten v. Howard*, 2 *Smedes & Marsh. R.* 527.

may be assigned directly from one person to another, and the assignee may sue in equity in his own name. For equity, being of more modern origin than the common law, is guided in its practice by rules more adapted to the exigencies of modern society.

In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment, of which our forefathers were happily ignorant, whilst canal and railway shares, and other shares in joint-stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the acts of parliament, under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as *choses in action*. They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst *choses in action* will, as we shall hereafter see, help to explain some of their peculiarities.

Such is a general outline of the subjects of modern personal property. They are distinguished from real property by being unaffected by the feudal rules of tenure, by being alienable by methods altogether different, by passing in the first instance to the executors, when bequeathed by will, and by devolving, on their owner's intestacy, not on his heir, but on an administrator* appointed by the Ecclesiastical Court, by whom they are distributed amongst the next of kin [*7] of the deceased. On the first of these characteristics, however, mainly depends the nature of the property which exists in things personal. The first lesson to be learned on the nature of real property is this—that of such property there can be no such thing as an absolute ownership; the utmost that can be held or enjoyed in real property is an estate (*n*). There may be an estate for life, or an estate tail, or an estate in fee simple; but, according to the law of England, there cannot exist over landed property any absolute and independent dominion. All the land in the kingdom is the subject of tenure; and if the estate is not holden of any subject, at any rate it must be held of the crown. With regard to personal property, however, the primary rule is precisely the reverse. Such property is essentially the subject of

(*n*) Principles of the Law of Real Property, 16.

absolute ownership, and cannot be held for any estate. It is true that the phrase *personal estate* is frequently used as synonymous with personal property; but this general use of the term *estate* should not mislead the student into the supposition that there can be any such thing as an estate in personalty properly so called. The rule that no estate can subsist in personal property would seem to have originated in the nature of such property in early times. Goods and chattels of a personal kind, in other words, moveable articles, then formed, as we have seen, the whole of a man's personal estate. And such articles, it is evident, may be the subjects of absolute ownership, and have not those enduring qualities which would render them fit to be holden by any kind of feudal tenure. As personal property increased in value and variety, many kinds of property of a more permanent nature became, as we have seen, comprised within the class of personal, such as leases [*8] for years, of whatever length, and *Consolidated Bank Annuities. But the rule that there can be no estate in chattels, the reason of which was properly applicable only to moveable goods, still continues to be applied generally to all sorts of personal property, both corporeal and incorporeal. The consequences of this rule, as we shall hereafter see, are curious and important. But in the first place it will be proper to consider the laws respecting those moveable chattels, or choses in possession, which constitute the most ancient and simple class of personal property; the class however which has given to the rest many of the rules for regulating their disposition.

* P A R T I.

[*9]

OF CHOSSES IN POSSESSION.

CHAPTER I.

OF CHATELS WHICH DESCEND TO THE HEIR

CHOSSES in possession are moveable goods, such as plate, furniture, farming stock, both live and dead, locomotive engines and ships. These, as has been before remarked, are essentially the subjects of absolute ownership, and cannot be held by estates; they are alienable by methods altogether different from those employed for the conveyance of landed property, and they devolve in the first instance on the executor of the will of their owner, or on the administrator of his effects, if he should die intestate. There are, however, some kind of chosses in possession which form exceptions to the general rule: these consist of certain chattels so closely connected with land that they partake of its nature, pass along with it, whenever it is disposed of, and descend along with it, when undisposed of, to the heir of the deceased owner. The chattels which thus form exceptions are the subject of the present chapter: they consist principally of *title deeds*, *heir-looms*, *fixtures*, *chattels vegetable*, and *animals feræ naturæ*. Of each in their order.

Title deeds, though moveable articles, are not strictly speaking chattels. They have been called the sinews of the land (*a*), and are so closely connected with it that they will pass, on a conveyance of the land, without being expressly mentioned: the property in the deeds *passes out of the vendor to the purchaser simply by the grant [*10] of the land itself (*b*). In like manner a devise of lands by will entitles the devisee to the possession of the deeds; and if a tenant in fee simple should die intestate, the title deeds of his lands will descend along with them to his heir at law (*c*). In former times, when

(*a*) Co. Litt. 6 a.

(*b*) *Harrington v. Price*, 3 Barn. & Adol. 170*; *Philips v. Robinson*, 4 Bing. 106*; S. C. 12 Moore, 308.

(*c*) *Wentworth's Office of an Executor*, 14th ed. 153; *Williams on Executors*, pt. 2, book 2, c. 3, s. 3.

warranty was usually made on the conveyance of lands (*d*), the rule was that the feoffor should retain all deeds containing warranties made to himself or to those through whom he claimed, and also all such deeds as were material for the maintenance of the title to the land (*e*). But if the feoffment was made without any warranty, the feoffee was entitled to the whole of the deeds; for the feoffor could receive no benefit by keeping them, nor sustain any damage by delivering them (*f*). Warranties have now fallen into disuse; but the principle of the rule above stated still applies when the grantor has any other lands to which the deeds relate, or retains any legal interest in the lands conveyed; for in either of these cases he has still a right to retain the deeds (*g*). And if the grantor should retain merely an equitable right to redeem the lands, as in the case of a mortgage in fee simple, it has been held that this equitable right is a sufficient interest in the lands to authorize him to withhold the deeds, unless they are expressly granted to the mortgagee (*h*). It is very questionable, however, whether [11] a legal right ought to be attached to an interest *merely equitable. And the doctrine last mentioned is opposed by a more recent decision in another court (*i*). (1).

(*d*) See Principles of the Law of Real Property, 344, 1st ed.; 346, 2nd edit.

(*e*) Buckhurst's case, 1 Rep. 1 b.

(*f*) 1 Rep. 1 a.

(*g*) Bro. Abr. tit. Charters de Terre, pl. 53; Yea v. Field, 2 T. Rep. 708; see, however, Sugd. Vend. & Pur. 465; 2 Prest. Conv. 466.

(*h*) Davies v. Vernon, 6 Q. B. 443, 447.*

(*i*) Goode v. Burton, 1 Exch. Rep. 189.*

(1) Since the recording acts, which are in universal operation in the American States, the different questions which have arisen in England as to the possession of title deeds, have become comparatively unimportant, as the recording, is, in all cases for the purposes of evidence and of notice to subsequent purchasers, made of the same validity, as the production, or possession of the title papers; Wilt v. Franklin, 1 Bin. R. 522. "In one case, only," it was said by McKean, C. J., "can the mortgagor be affected by suffering the title deeds to remain in the hands of the mortgagee, and that is, where after the execution of the mortgage, and before the same is recorded, the mortgagor, on the strength of the title papers in his hands, borrows money on a second mortgage. If this

second loan was made without knowledge of the first encumbrance, and before the first mortgage was put into the recorder's office, then I should apprehend the first mortgage should be postponed." Evans v. Jones, 1 Yeates, R. 172. These remarks were made under the Pennsylvania Act of 1715, which gave the mortgagee six months within which to record his deed, and if correct, would apply in Pennsylvania to the case of vendees who have also six months.

Under the present acts of assembly of that State, a mortgage, unless to secure purchase money, is not a lien until recorded; purchase money mortgages, constitute valid liens from their date, if recorded within sixty days; but it is presumed that such an instrument must appear on its face to be a purchase money mort-

If a conveyance of lands should be made by way of use, thus, if lands should be granted to A. and his heirs, to the use of B. and his heirs, it is said that the title deeds of the land will belong to A., the grantee; because, although the Statute of Uses (*j*) conveys the legal estate in the lands from A. to B., it does not affect the title deeds, which must consequently still remain vested in A. (*k*). But this doctrine has been justly questioned, on the ground that the legislative conveyance from A. to B., effected by the Statute of Uses, ought to be at least as powerful as the common law conveyance of the lands to A., and if the latter conveyance can carry with it the deeds relating to the land, the former conveyance should be considered as powerful enough to do the same (*l*).

The tenant of an estate in fee simple in lands possesses the highest interest which the law of England allows to any subject; and such a tenant possesses also an absolute property in the title deeds, which he may destroy at his pleasure, or sell for the value of the parchment (*m*). But if the lands to which deeds relate should be settled on any person for life or in tail, a qualified ownership will arise with respect to the deeds, different in its nature from that simple property which is usually held in chattels personal. As the lands are now held for a limited estate, so a limited interest in the deeds belongs to the tenant. The tenant for life or in tail, when in possession of the lands, being the freeholder for the time being, is entitled *also to the possession of the deeds (*n*); (1) whereas the tenant for a mere [*12]

(*j*) 27 Hen. VIII. c. 10.

(*k*) 1 Sand. Uses, 4th ed. 119; 5th ed. 117.

(*l*) Sugd. Vend. & Pur. 464; Co. Litt. 6 a n. (4).

(*m*) Cro. Eliz. 496.

(*n*) Ford v. Peering, 1 Ves. jun. 76; Strode v. Blackburne, 3 Ves. 225.

gage, and it may be doubted if the lien of such a mortgage would be valid before the date of its record, as against a subsequent *bona fide* lien creditor or purchaser, having no notice of it, if the deed of conveyance has been recorded, or is exhibited to him, acknowledging in its body and in the receipt at its foot, payment of the consideration money.

(1) The tenant for life is *prima facie* entitled to the possession of the title deeds, and although in a proper case the Court will grant an inspection of them to the

remainder-man, the precise object of the motion must be set forth, and the Court will exert a paternal authority to see that it is for no improvident or improper purpose; Shaw v. Shaw, 12 Price's Exchequer R., p. 163.

The right to title deeds goes with the land, (Lord Burckhurst's case, 1 Co. 1 Res. 2; Atkinson v. Baker, 4 T. R. 229,) and they are so completely part of the realty that at common law no larceny could be committed of them; 3 Inst. 109.

term of years, of whatever length, not having the freehold or feudal possession of the lands, has no right to deeds which relate to such freehold (*o*); although deeds relating only to the term belong to such a tenant, and will pass, without any express grant, to the assignee of the term (*p*). The tenant for life or in tail in possession, though entitled to the possession or custody of the deeds which relate to the inheritance, has no right to injure or part with them (*q*): he has an interest in the title deeds correspondent only to his estate in the lands; and if he should part with the deeds, even for a valuable consideration, the remainder-man, on coming into possession of the lands, will nevertheless be entitled to the possession of the deeds, just as if the tenant for life or in tail had kept them in his own custody (*r*).

Heir-looms, strictly so called, are now very seldom to be met with. They may be defined to be such personal chattels as go, by force of a *special custom*, to the heir, along with the inheritance, and not to the executor or administrator of the last owner (*s*). The owner of an heir-loom cannot by his will bequeath the heir-loom, if he leave the land to descend to his heir; for in such a case the force of the custom will prevail over the bequest, which not coming into operation until after the decease of the owner, is too late to supersede the custom (*t*). According to some authorities heir-looms consist only of bulky articles, [*13] such as tables and benches fixed to the *freehold (*u*): but such articles would more properly fall within the class of fixtures, of which we shall next speak. The ancient jewels of the crown are heir-looms (*v*). And if a nobleman, knight or esquire be buried in a church, and his coat armour or other ensigns of honor belonging to his degree be set up, or if a tombstone be erected to his memory, his heirs may maintain an action against any person who may take or deface them (*x*). The boxes in which the title deeds of land are kept are also in the nature of heir-looms, and will belong to the heir or devisee of the lands; for such boxes "have their very

(*o*) *Churchill v. Small*, 8 Ves. 323; *Harper v. Faulder*, 4 Mad. 129, 138; *Hotham v. Somerville*, 5 Beav. 360.

(*p*) *Hooper v. Ramsbottom*, 6 Taunt. 12.*

(*q*) Bro. Abr. tit. *Charters de Terre*, pl. 36.

(*r*) *Davies v. Vernon*, 6 Q. B. 443.*

(*s*) See Co. Litt. 18 b.

(*t*) See Co. Litt. 185 b. [See 2 Wooddesson, sec. 380; Com. De. Biens; Hargrave's notes, Co. Litt. 18 b.; 1 P. Wms. 730.]

(*u*) Spelman's Glossary, voce *Heir-Loom*. See Wms. on Ex'rs, pt. 2, bk. 2, ch. 2, s. 3.

(*v*) Co. Litt. 18 b.

(*x*) Co. Litt. 18 b.

creation to be the houses or habitations of deeds (*y*);” and accordingly a chest made for other uses will belong to the executor or administrator of the deceased, although title deeds should happen to be found in it. In popular language the term “heir-loom” is generally applied to plate, pictures or articles of property which have been assigned by deed of settlement, or bequeathed by will to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion-house in which the articles may be placed. Of this kind of settlement more will be said hereafter.

Fixtures are such moveable articles or chattels personal as are fixed to the ground or soil, either directly or indirectly, by being attached to a house or other building. The ancient common law, regarding land as of far more consequence than any chattel which could be fixed to it, always considered every thing attached to the land as part of the land itself,—the maxim being *quicquid plantatur solo, solo credit* (*z*). Hence it followed *that houses themselves, which consist of [*14] aggregates of chattels personal (namely, timber and bricks) fixed to the land, were regarded as land, and passed by a conveyance of the land without the necessity of express mention; and this is the case at the present day (*a*) (1). So now, a conveyance of a house or

(*y*) Wentworth's Office of an Executor, 157, 14th edit.

(*z*) See 4 Rep. 64 a; 1 Lord Raymond, 738; Mackintosh v. Trotter, 3 Mee. & Wels. 184, 186*; Williams on Executors, part 2, bk. 2, ch. 3, s. 2.

(*a*) See Principles of the Law of Real Property, 13.

(1) And in the United States, generally, State Bk., 7 Blackf. R. 469; Bratton v. permanent machinery, such as the main Clawson, 2 Strobb. R. 478; Degraffenreid wheel and its gearing, an engine attached v. Scruggs, 4 Humph. R. 431; English v. to a building, a cotton gin fixed to its place, Foote, 8 Smedes & Marsh. R. 444; Trull will vest in the grantee of the real estate to v. Fuller, 28 Maine R. 545; Corliss v. which they belong. McLagin, 29 Id. 115; Preston v. Briggs,

16 Vt. R. 124; Miller v. Plumb, 6 Cowen's R. 665.

It is not necessary that the machinery shall be actually affixed to the realty in order to pass with it, where it is of course, to have it occasionally detached, as, for instance, a set of rolls in an iron rolling mill, temporarily detached in order to insert others; Voorhis v. Freeman, 2 Wats. & Ser. R. 719; Powell v. Manufacturing Co., 3 Mason R. 459; Farrar v. Stackpole, 6 Greenleaf R. 154; Sparks v. The same rule will hold in the case of a mortgage, and such articles will be bound by it; Union Bk. v. Emerson, 15 Mass. R. 159; Voorhis v. Freeman, 2 Watts & Serg. R. 116; Despatch Line of Packets v. Belamy, 12 N. H. Rep. 205; Sparks v. State Bk., 7 Blackf. R. 469; Day v. Perkins, 2 Sandf. Ch. R. 359; Winslow v.

other building will compromise all ordinary fixtures, such as stoves, grates, shelves, locks, &c., without any express mention (*b*), unless an intention to withhold the fixtures can be gathered from the context (*c*). So on the decease of a tenant in fee simple, the devisee of a house, or the heir at law in case of intestacy, will be entitled generally to the fixtures set up in it (*d*). The ancient rule respecting fixtures has been greatly relaxed in favour of tenants for terms of years, who are now permitted to remove articles set up by them for the purposes of trade or of ornament or domestic convenience (*e*), provided they remove them before the expiration of their term (*f*) (1). But the old rule still

(*b*) *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76*; *S. C.* 3 Dowl. & Ry. 255; *Longstaff v. Meagoe*, 2 Ad. & Ell. 167; * *Hitchman v. Walton*, 4 Mee. & Wels. 409; * *Sug. V. & P.* 37.

(*c*) *Hare v. Horton*, 5 Barn. & Adol. 715.*

(*d*) *Shep. Touch.* 470.

(*e*) *Grymes v. Boweren*, 6 Bing. 437.*

(*f*) *Lyde v. Russell*, 1 Barn. & Adol. 394.*

Merchants' Ins. Co., 4 Met. R. 306; *Butler v. Page*, 7 Id. 40. And even though put up after the mortgage was given; *Roberts v. Dauphin Bank*, 7 Har. R., 71. The doctrine has been carried to its farthest extent in Pennsylvania, where all machinery necessary to constitute a manufactory passes with the land on which it stands. The criterion is not the permanent fastening to the freehold; *Harlan v. Harlan*, 13 Har. R. 513; *Heaton v. Findlay*, 12 Jones' R. 304; *Pyle v. Pennock*, 2 Wat. & Serg. R. 390; *Voorhis v. Freeman*, 2 Id. 116.

But in New York, under the revised statutes, the rule is that nothing personal will pass as a *fixture* unless it be permanently fixed to the freehold. And the machinery in a woolen factory is personal property; *Walker v. Sherman*, 20 Wend. R. 636.

And this would seem to be the rule in Connecticut and Massachusetts, where machinery which can be removed without injury to the building, is personal property as respects creditors and purchasers; *Swift v. Thomson*, 9 Conn. R. 63; *Gale v. Ward*, 14 Mass. R. 352.

Preston v. Briggs, 16 Vt. R. 124;

Stockwell v. Marks, 5 Shepley's R. 455; *Beers v. St. John*, 16 Conn. R. 522; *Shepard v. Spaulding*, 4 Metcalfe's R. 416; *The State v. Elliott*, 11 N. Hamp. R. 340; *White v. Arndt*, 1 Whart. R. 91.

(1) Some of the American cases to this point are:—

Gaffield v. Hapgood, 17 Pick. R., 192; *Ex parte Quincy*, 1 Atk. R., 477; *Holmes v. Tremper*, 20 Johns. R., 29; *Whiting v. Braston*, 4 Pick. R., 310; *Lelane v. Gasset*, 17 Vt. R., 463; *Cook v. Champlain Company*, 1 Denio. R., 91; *Van Ness v. Pacard*, 2 Peters' R., 153; *Russell v. Richards*, 1 Fairfield R., 429; *Tapley v. Smith*, 18 Maine R., 12; *Cresson v. Stout*, 17 Johns. R., 116; *Tobias v. Frances*, 3 Vt. R., 425; *Taffe v. Warnick*, 3 Blackf. Ind. R., 111; *Reynolds v. Shutter*, 5 Cowen's R., 323; *Raymond v. White*, 7 Id., 318; *Wetherbee v. Foster*, 5 Vt. R., 136; *Taylor v. Townsend*, 8 Mass. R., 411; *Blood v. Richardson*, 2 Kent Com., 7th ed., p. 404, note; *White's Appeal*, 10 Barr's R., 253; *Case of the Olympic Theatre*, 2 Br., 285; *Ross' Appeal*, 9 Barr's R., 494; *White v. Arndt*, 1 Wh. R., 91; *Gray v. Holdship*, 17 Serg. & Raw. R., 415; 1 Missouri R., 508.

prevails with regard to agricultural fixtures, which, though set up by the tenant, become, by being fixed to the soil, the property of the landlord (*g*) (1), unless they are put up with the consent *in writing* of the landlord for the time being, in which case it is provided by a recent act (*h*) that they shall be the property of the tenant, and shall be removeable by him on giving to the landlord or his agent one month's previous notice in writing of his intention so to do, subject to the landlord's right to purchase the same by *valuation in the manner provided by the act. This act extends to farm [*15] buildings either detached or otherwise, and to engines and machinery, either for agricultural purposes or for the purposes of trade and agriculture, although built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed. A relaxation of the old rule has also been made in favour of the executors of a tenant for life, who appear to be allowed to remove fixtures set up by their testator for the purposes of trade or of ornament or domestic convenience (*i*). But the rule of the common law still retains much of its force as between the devisee or heir of a tenant in fee simple and his executor or administrator. Thus a tenant for years may remove marble chimney pieces set up by him during his tenancy; but if erected by a tenant in fee simple, they will pass with the house to the

(*g*) *Elwes v. Maw*, 3 East, 38.

(*h*) Stat. 14 & 15 Vict. c. 25, s. 3.

(*i*) *Lawton v. Lawton*, 3 Atk. 14.

(1) This doctrine has not been directly overruled in the United States, but has been strongly questioned. Whenever the question has been before the Courts, they have leaned in favor of the agricultural tenant, though deciding as for a manufacturing tenant; *Van Ness v. Pacard*, 2 Peters' R., 137; *Whiting v. Braston*, 4 Pick. R., 310; *Holmes v. Tremper*, 20 Johns R., 29.

Farm fences, however, belong to the realty; *Mott v. Palmer*, 1 Comst. R., 564; *Walker v. Sherman*, 20 Wend. R., 646.

The same policy of encouraging agricul-

tural improvements will not permit the outgoing tenant to remove manure which has accumulated during the term; *Lassell v. Reed*, 5 Greenleaf's R., 222; *Middlebrook v. Corwin*, 15 Wend. R., 169; *Daniels v. Pond*, 21 Pick. R., 367; *Lewis v. Jones*, 5 Har. R., 262; *Kitteridge v. Rhodes*, 3 N. H. Rep., 508; *Parsons v. Campbell*, 11 Com. R., 525.

The outgoing tenant of a nursery has the right to take up and carry away trees and shrubs as personal property; *Miller v. Baker*, 1 Met. R., 27; *King v. Wilcomb*, 7 Barb. Sup. Ct. R., 263.

devisee or heir (*k*). So machinery employed in carrying on iron works or collieries may be removed by a lessee for years, if erected by him; but if erected by a tenant in fee simple, such machinery, even though removable without injury to the freehold, will belong to the heir or the devisee of the land (*l*). However it seems that pier glasses, fixed by nails, and not let into panels, and hangings fastened up for ornament, will now belong to the executor or administrator of a tenant in fee simple as part of his personal estate (*m*) (1).

(*k*) *Dudley v. Warde*, Amb. 113.

(*l*) *Fisher v. Dixon*, 12 Cl. & Fin. 312.

(*m*) *Cave v. Cave*, 2 Vern. 508; *Squire v. Mayor*, 2 Eq. Ca. Abr. 430, pl. 7; S. C. 2 Freem. 249.

(1) In New York, by the Rev. Stat., the executor is put on the same footing as the tenant as to the right to fixtures; *House v. House*, 10 Paige's R., 163.

The law of fixtures has, in derogation of the original rule of the common law, which subjected every thing affixed to the freehold to the law governing the freehold, made the right of removing fixtures the general rule instead of the exception; 2 Kent's Com., 6th ed., p. 343. In the leading case of *Elwes v. Mawe*, 3 East's R., 38, Lord Ellenborough divided the questions respecting the right to what are ordinarily called fixtures into three classes—1st, those arising between different descriptions of representatives of the same owner of the inheritance, viz., the heir and executor, in which case the rule obtains with most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2d, between the executors of tenant for life or in tail and the remainder-man or reversioner, in which case the right to fixtures is considered more favorably for the executor. 3d, between landlord and tenant, in which in favor of trade and to encourage industry, the greatest latitude and indulgence has been allowed in favor of the claim of the tenant to have particular articles considered as personal chattels as against the owner of the freehold, although

in the case last referred to, the rule laid down was held to apply as between landlord and tenant only to the case of fixtures set up for trading purposes and not to extend to agricultural ones; the tendency has been both in this country and in England, to extend it to the latter also, and to treat the occupation of agriculture as a trade; *Lawten v. Lawten*, 3 Atk. R., 113; *Dudley v. Warde*, Amb. R., 13; in which last case Lord Hardwicke appears to have considered the privilege in question as belonging to fixtures by means of which the owner, a tenant for life, carried on a species of trade, by which he rendered the produce of his own land available to his own profit. See also *Penton v. Robart*, 2 East R., 91; *Mansborough v. Maton*, 4 A. & E. R., 884; *R. v. Ottey*, 1 B. & Ald. R., 161; *Van Ness v. Pacard*, 2 Pet. U. S. R., 137; *Whiting v. Braston*, 4 Pick. Rep., 310; *Holmes v. Tremper*, 20 Johns. Rep., 29.

The strict rule as to fixtures which applies between heir and executor also applies as between vendor and vendee, and mortgagor and mortgagee; *Winslow v. Merchants' Insurance Co.*, 4 Metcalf R., 306; *Preston v. Briggs*, 16 Vermont R., 124; *Miller v. Plumb*, 6 Cowen's R., 665; *Hare v. Hertton*, 2 Neville & Manning R., 428. *Pyle v. Pennock*, 2 Wat. & Serg. R., 396. The same rule applies in favour of one claiming fixtures under an execution as real estate; *Goddard v. Chase*, 7 Mass. R., 432:

Where fixtures are demised to a tenant along with the *house, mill, or other building in which they may happen to be, the property in the fixtures still remains in the landlord, subject to the tenant's right to the possession and use of them during his term (*n*); and if they should be severed from the building by the tenant or any other person, or should be separated by accident, the landlord will acquire an immediate right to the possession of them (*o*). In this respect they are subject to the same rules as timber, which, as we shall see, is equally a part of the inheritance until severed, and when cut becomes the personal property of the owner of the fee. Fixtures, which would descend with the house or building to the heir of the owner of the fee on intestacy, are not in fact his goods and chattels properly so called (*p*). [*16]

Chattels vegetable consist, as their name imports, of moveable articles of a vegetable origin, such as timber, underwood, corn, and fruit. All these articles, so long as they remain unsevered from the land, are for many purposes considered as part of it; and they will pass by a conveyance or devise of the land without express mention (*q*). If, however, the trees should be expressly excepted out of the conveyance, they will remain the personal property of the grantor, although severed only in contemplation of law (*r*); and in like manner the trees alone may be granted by a tenant in fee simple, and will then form the personal property of the grantee, even before they are cut down (*s*). But if a tenant of lands in fee simple should die without having sold or devised *them, or having devised them and also having made a bequest of his personal estate (*t*), the law then draws a distinction between such vegetable products as are the annual [*17]

(*n*) *Boydell v. M'Michael*, 1 Cro. Mee. & Rose. 177; * *Hitchman v. Walton*, 4 Mee. & Wels. 409.*

(*o*) *Farrant v. Thompson*, 5 Barn. & Ald. 826.*

(*p*) *Winn v. Ingilby*, 5 Barn. & Ald. 625.*

(*q*) Com. Dig. tit. Biens (H.)

(*r*) *Herlakenden's case*, 4 Rep. 63 b.

(*s*) *Wentworth's Office of an Executor*, 14th ed. 148; *Williams on Executors*, pt. 2. bk. 2, ch. 2, sec. 2.

(*t*) *Rudge v. Winnall*, 12 Beav. 357.

Voorhis v. Freeman, 2 W. & S. R., 114. as against the owner of the freehold, by an assignee or an execution creditor; *Lemar v. But*, when a tenant is entitled to remove them from the freehold and treat them as personalty, the same right may be exercised *Mills*, 3 Watts. R., 232; *Doty v. Gerham*, 5 Pick. R., 487; 17 Serg. & Raw. R., 413.

result of agricultural labour, and such as are not. The former class are called by the name of *emblements*, and the right to reap them belongs to the executor or administrator of the deceased in exclusion of the heir or devisee (*u*); whilst the latter class descend to the heir or pass to the devisee along with the land (*1*). The reason of the distinction appears to be, that as annual crops are mainly the result of labour incurred at the expense of the owner's personal estate, his personal estate ought to reap the benefit of the crop which results (*x*). Accordingly crops of corn, and grain of all kinds, flax, hemp, and everything yielding an artificial annual profit produced by labour, belong to the executor or administrator, as against the heir or devisee; whilst timber, fruit trees, grass, and clover, which do not repay within the year the labour by which they are produced, belong to the heir or devisee as part of the land (*y*). The right to emblements also belongs to the executor or administrator of a tenant for life (*z*), and to a tenant at will if dismissed from his tenancy before harvest (*a*) (*2*). The claims

(*u*) Com. Dig. tit. Biens (G.)

(*x*) Wentworth's Office of an Executor, 14th ed. 147.

(*y*) See *Graves v. Weld*, 5 Barn. & Adol. 105; * S. C. 2 Nev. & Man. 725.

(*z*) Principles of the Law of Real Property, 24, 2nd ed., 25, 3rd ed.

(*a*) Ibid. p. 310, 2nd ed.

(1) In England, it would appear that the outgoing tenant of a farm has a right to take away the manure unless the landlord would pay him its value; *Roberts v. Barker*, 1 Crompt & Meeson R., 809; *Gibbons on Delapidations*, 76. But in this country, in several instances it has been held that manure made on a farm is not only an appurtenance of the realty, which passed with a conveyance of the land from the grantor to the grantee, but that it is so inseparably incident to the freehold, that it forms an exception to the usual rule as to fixtures, and cannot be removed by an outgoing tenant at the end of his term; *Lassell v. Reed*, 6 Greenl. R., 222; *Middlebrook v. Corwin*, 15 Wendell's R., 169; *Daniels v. Pond*, 21 Pick. R., 367; *Kitteridge v. Wood*, 3 N. Hamp. R., 503; *Parsons v. Campbell*, 11 Conn. R., 525; *Goodrich v. Jones*, 2 Hill's R., 142; *Lewis v. Jones*, 9 Penna. Leg. Int., 18; *Waln v. O'Connor*, Id., 67; *Barrington v. Justice*, 4 Id., 289.

(2) It is a doctrine of the common law, that where a tenant sows the land, with the expectation of gathering the harvest, no sudden and unlooked for termination of his estate, either by the act of God, or the act of the lessor, shall deprive him or his representatives of the fruit of his labor; but if the tenant's interest is to determine at a fixed time, or if he by his own act has brought his lease to a conclusion, he cannot claim the profits, for it is by his own folly that he has sowed that which he could not reap. This doctrine of the emblements, as it is called, is pretty generally received in the United States, it having been held, that where the lease is to expire at a fixed time, or is terminated by the act of the lessee, he is not entitled to the emblements; *Hawkins v. Skegg*, 10 Hump. R., 31; *Harris v. Carson*, 7 Leigh's R., 632; *Debow v. Colfax*, 5 Halst. R., 128; *Kitteridge v. Woods*, 3 N. H. R., 504; *Whitmarsh v. Cutting*, 10 Johns R., 360; *Bain v. Clark*, Id. 424. On the other hand, where the

of tenants at rack rent, whose tenancies may determine by the death or cesser of the estate of tenants for life, or for any other uncertain interest, are now provided for by a recent enactment, giving the tenants at rack rent a right to continue to hold until the expiration of the current year of their tenancy (*b*).

(*b*) Stat. 14 & 15 Vict. c. 25, s. 1. See Principles of the Law of Real Property, p. 25, 3d ed.

estate is of an uncertain termination, and it is suddenly concluded by the act of God, or that of the lessor, the lessee or his legal representatives may claim the emblements; *Comfort v. Duncan*, 1 Miles' R., 229; *Davis v. Thompson*, 13 Maine R., 209; *Sherburne v. Jones*, 20 Id., 70; *Davis v. Brockenbank*, 9 N. H. R., 73; *Debow v. Colfax*, 5 Halst R., 128; *Kitteridge v. Woods*, 3 N. H. R., 504; *Rising et al. v. Stannard*, 17 Mass. R., 287; *Stewart v. Doughty et als.*, 9 Johns. R., 108; *Weem's exec. v. Bryan, et ux.*, 21 Ala. R., 303. And in several of the states there are statutory provisions on this subject; *Freeman v. Tompkins*, 1 Strobb. Eq. R., 53; *Gage v. Rogers, Id.*, 370; *Thompson v. Thompson*, 6 Munf. R., 514; *Green v. Cutwright, Wright's R.*, 738. In Pennsylvania, New Jersey and Delaware, the local custom which prevails in certain parts of England of allowing all tenants a way going crop, has been adopted as the law of those states. Under it, the tenant is entitled to his "way going crop" even though his estate may have been limited to expire at a fixed time, as, for example, at the end of one year; *Demi v. Bossler*, 1 Penna. R., 224; *Stultz v. Dickey*, 5 Bin. R., 285; *Carson v. Blazer*, 2 Id., 475; *Briggs et als. v. Brown*, 2 Serg. & Raw. R., 14; *Rank v. Rank*, 5 Barr's R., 213; *Craig v. Dale*, 1 Wat. & Serg. R., 509; *Forsythe v. Price*, 8 Wat. R., 282; *Iddings v. Nagle*, 2 Wat. & Serg. R., 22; *Comfort v. Duncan*, 1 Miles' R., 229; *Deaver v. Rice*, 4 Dev. & Bat. R., 431; *Diffendorfer v. Jones*, cit. 5 Bin. R., 289; *Van Doren v. Everitt*, 2 South. R., 460; *Templeman v. Biddle*, 1 Harring. R., 522; the principle of which decisions may be gathered from the words of C. J. Tilghman, in the case of *Shultz v. Dickey*, where he says

that "In the nature of the thing, it is reasonable, that where a lease commences in the spring of one year, and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired, otherwise he pays for the land one whole year without having the benefit of a winter crop."—But the "way going crop" is the crop of wheat which is sown in the autumn and reaped the following summer, and never that crop of wheat which is sown in the spring of the year; *Demi v. Bossler*, 1 Pa. R., 224.

But the right of the tenant to his "way going crop," or to his emblements, may be defeated by a sale of the premises under a judgment or mortgage against his landlord, the lien of which is anterior to the lease; *Sallade v. James*, 6 Barr's R., 144; *Bear v. Bitzer*, 4 Har. 175; *Groff v. Levan, Id.*, 179; *Pitts v. Hendrix*, 6 Geo. R., 452; *Gilett v. Balcom*, 6 Barb. S. R., 370; *Jones v. Thomas*, 8 Blackf. R., 428; *Shepard v. Philbrick*, 2 Denio's R., 174; *Lane v. King*, 8 Wend. R., 584; *Crews v. Pendleton*, 1 Leigh's R., 257; *King v. Fowler*, 14 Pick. R., 238; but see to the contrary, *Cassily v. Rhodes*, 12 O. R., 88, which decides that a lessee is entitled to the emblements as against a purchaser of lands sold under a decree of foreclosure.

The doctrine of emblements does not apply to the public lands of the United States; *Boyer v. Williams*, 5 Mo. R., 335; *Rasor v. Qualls*, 4 Blackf. R., 286.

For further on the subject of emblements, see—*Foster v. Fletcher*, 7 Mon. R., 534; *Green v. Cartwright, Wright's R.*, 738; *Humphries v. Humphries*, 3 Ired. R., 362; *Evans v. Inglehart*, 6 G. & Johns' R., 190; *Singleton v. Singleton*, 5 Dana's R., 92; *Toby v. Reed*, 9 Conn. R., 225.

[*18] When lands are let to a tenant for years or for life, if *no exception is made of the timber, the property in the timber will still remain in the owner of the inheritance, subject to the tenant's right to have the mast and fruit growing upon it, and the loppings for fuel, and the benefit of the shade for his cattle (*c*). Accordingly all fruit which may be plucked, or bushes or trees, not being timber, which may be cut or blown down, will belong to the tenant (*d*); but timber trees, which may be cut or blown down, will immediately become the property of the owner of the first estate of inheritance in the land, whether in fee simple or in tail (*e*). Timber trees are oak, ash and elm in all places; and in some particular parts of the country, by local custom, where other trees are generally used for building, they are for that reason considered as timber (*f*). But if the tenant should be a tenant *without impeachment of waste* (*sine impetitione vasti*), timber cut down by him in a husband-like manner will become his own property when actually severed (*g*), but not before, (*h*); for the words "without impeachment of waste" imply a release of all *demands* in respect of any waste which may be committed (*i*). If, however, the words should be merely *without being impleaded for waste*, the property in the trees when cut would still remain in the landlord, and the action only would be discharged, which he might otherwise have maintained against the tenant for the waste committed by the act of felling the timber (*k*).

[*19] *Animals *feræ naturæ*, or wild animals, including game, are exceptions from the rules which relate to other moveables, on the ground that until they are caught there is no property in them. If, therefore, the owner of land in fee simple should die, the game on his land, or the fish in any river or pond upon the land, will not belong to his executor or administrator (*l*). And if a man should have a park or warren, he has no true property in the deer, conies, pheasants, or

(*c*) Liford's case, 11 Rep. 48 b.

(*d*) Channon v. Patch, 5 Barn. & Cress. 897; * S. C. 8 Dow. & Ry. 651; Berriman v. Peacock, 9 Bing. 384; * S. C. 2 Moo. & Scott, 524; Pidgely v. Rawling, 2 Coll. 275.

(*e*) Herlakenden's case, 4 Rep. 63 a; Whitfield v. Bewit, 2 P. Wms. 240; 3 P. Wms. 268.

(*f*) 2 Black. Com. 281.

(*g*) Lewis Bowle's case, 11 Rep. 82 b. See Principles of the Law of Real Property. 23, 2nd ed.; 24, 3rd ed.

(*h*) Cholmeley v. Paxton, 3 Bing. 207; * 10 Barn. & Cress. 564.*

(*i*) 11 Rep. 82 b.

(*k*) Walter Idle's case, 11 Rep. 83 a.

(*l*) Co. Litt. 8 a; The case of Swans, 7 Rep. 17 b.

partridges; but they belong to him only "*ratione privilegii* for his game and pleasure so long as they remain in the privileged place (*m*).” But a property in wild animals may be obtained by reclaiming or catching them (*propter industriam*), or by reason of their being unable to get away, (*propter impotentiam*) (*n*). Thus deer, even though in a legal park, may be so tame and reclaimed as to pass to the executors of the owner of the park on his decease (*o*), so rabbits in a hutch, fish in a box, and young pigeons in a dove house, unable to fly, will belong to the executor or administrator of the owner, and not to his heir. It appears to have been formerly thought that hawks and hounds were not subjects of personal property, but would descend with the lands to the heir; but this opinion is not now law. “For,” observes the author of the Office of an Executor (*p*), “although they be for the most part but things of pleasure, *that hindereth not but they may be valuable as well as instruments of music, both tending to delight and exhilarate the spirits; a cry of hounds hath to my sense more spirit and vivacity than any other music.*”

*The occupier of land for the time being has now the sole right of killing and taking the game upon the land, unless such right [*20] be reserved to the landlord, or any other person (*q*). Where the landlord has reserved to himself the right of killing game, he may authorize any person or persons, who shall have obtained certificates, to enter upon the land for the purpose of pursuing and killing game thereon (*r*). And the lord of any manor or reputed manor has the right to pursue and kill the game upon the wastes or commons within the manor, and to authorize any other person or persons, who shall have obtained certificates, to enter upon such wastes or commons for the same purpose (*s*).

When game or other wild animals were killed on any land by any other person than the rightful owner, the law, with respect to the property in the game, was formerly as follows: If a man started any game within his own grounds and followed it into another's, and killed

(*m*) 7 Rep. 17 b; Year Book, 4 Hen. VI. 55 b, 56 a; F. N. B. 87, n. (*a*).

(*n*) 2 Black. Com. 391, 394; Williams on Executors, pt. 2, bk. 2, ch. 2, sec. 1.

(*o*) Morgan v. The Earl of Abergavenny, 8 C. B. 768.*

(*p*) Wentworth's Office of an Executor, 143, 14th ed. The author of this work is supposed to have been Mr. Justice Doddridge.

(*q*) Stat. 1 & 2 Will. IV. c. 32. See as to hares, stat. 11 & 12 Vict. c. 29.

(*r*) Stat. 1 & 2 Will. IV. c. 32, s. 11.

(*s*) Sect. 10.

it there, the property remained in himself. And so if a stranger started game in one man's chase or free warren, and hunted it into another liberty, the property continued in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man started game on another's private grounds, and killed it there, the property belonged to him in whose ground it was killed. Whereas, if, after being started there, it was killed in the grounds of a third person, the property belonged not to the owner of the first ground, because the property was local; nor yet to the owner of the second, because it was not started in his soil; but it vested in the person who started and killed it, though guilty of [*21] a trespass against both the *owners (*t*). And this appears to be still the law with respect to wild animals which are not game. But with respect to game, an alteration appears to have been made by the last Game Act (*u*), which seems to vest the property in game killed on any land by strangers, in the person having the right to kill and take the game upon the land (*x*).



[*22]

*CHAPTER II.

OF TROVER, BAILMENT AND LIEN.

HAVING now considered those moveable articles of property which form exceptions to the rules by which chattels personal are in general governed, let us proceed to notice some circumstances in which chattels personal may be placed, so as to form not real but apparent exceptions to the primary rule already noticed (*a*), that personal property is essentially the subject of absolute ownership, and cannot be held for any *estate*. The property in goods can only belong to, or be vested in, one person at one time: in this respect it resembles the seisin or feudal possession of lands (*b*). Lands however may be so conveyed that several persons may possess in them, at the same time, several distinct vested *estates* of freehold, one of them being in possession, and the

(*t*) 2 Bl. Com. 419; Churchward v. Studdy, 14 East, 249.

(*u*) Stat. 1 & 2 Will. IV. c. 32.

(*x*) Sect. 36.

(*a*) Ante, p. 7.

(*b*) See Principles of the Law of Real Property, 111, 2nd ed.; 116, 3rd, ed.

others in remainder, or the last perhaps being in reversion (c). But the law knows no such thing as a remainder or reversion of a chattel. It recognizes only the simple *property* in goods, coupled or not with the right of immediate possession. This simple principle of law, if carefully borne in mind, will serve to explain many points which would otherwise appear difficult or even contradictory. It must be remembered, however, that it does not strictly apply to the moveable articles noticed in our first chapter, which, from their connexion with the land, are often governed by the principles of real, rather than those of personal property.

*1. When the property in goods is coupled with the possession [*23] of them, the ownership is of course complete. This is the common and usual case of the ownership of chattels personal: the owner knows that the goods are his own, and in his own possession, and that is sufficient for him. Circumstances may, however, arise to change this state of things. An article may be lost. In this case the owner still retains his property in the thing, but he has lost the possession of it. The property however which still remains in him, entitles him to the possession of the article, whenever he can meet with it; or, in legal phraseology, the property draws with it the right of possession (d). If therefore another person should find the article lost, he will have no right to convert it to his own use, but must on demand deliver it up to the rightful owner, in whom the property is already vested. If he should refuse to do so, such refusal will argue that he claims it as his own, and will accordingly be evidence of a conversion of the thing to his own use (e). For the wrong or *trespass* thus committed, a specific remedy has been provided by the law, in the shape of an action of *trover and conversion*, or more shortly an action of *trover*, which is one of those actions comprised within the technical class of *trespass on the case*. The word *trover* is from the French *trouver*, to find; and the word *conversion* is added, from the conversion of the goods to the use of the defendant being the gist of the action thus brought against him. That the defendant should have found the article lost is not his fault, but his conversion of it to his own use is a trespass, and renders him liable to the action we are now considering. This action accordingly is now constantly brought to recover damages for withholding the

(c) Ibid. p. 198, 2nd ed.

(d) 2 Wms. Saunders, 47 a.

(e) Ibid. 47 e; Agar v. Lisle, Hob. 187; Bac. Ab. tit. Trover, (B).

possession of goods, whenever they have been wrongfully converted by the defendant to his own use, without regard to the means, whether [*24] by *finding or otherwise, by which the defendant may have become possessed (*f*). This action can be maintained only when the plaintiff has been in possession of the goods (*g*), or has such a property in them as draws to it the right to the possession. If the goods have been wrongfully converted by the defendant to his own use, the plaintiff will succeed, if he should prove either way his own right to the immediate possession of the goods (*h*); if he should not prove such right, he will fail (*i*). The property in the goods is that which most usually draws to it the right of possession; and the right to maintain an action of trover is therefore often said to depend on the plaintiff's *property* in the goods; the right of immediate possession is also sometimes called itself a special kind of property (*k*); but these expressions should not mislead the student. The action of trover tries only the right to the immediate possession, which, as we shall now see, may exist apart from the *property* in the goods.

For let us suppose that the finder of the article lost, whilst ignorant of the true owner, should have been wrongfully deprived of it by a third person. In this case, the owner being absent, the finder is evidently entitled to the possession of the thing; and he will accordingly succeed in an action of trover brought by him against the wrong- [*25] doer (*l*)(1). Here the property in the *thing which was lost evidently belongs still to the original owner; but the right of

(*f*) 3 Black. Com. 153.

(*g*) Addison v. Round, 4 Ad. & Ell. 799; * S. C. 6 Nev. & Man. 422; Brooke v. Mitchell, 6 N. C. 349; * S. C. 8 Scott, 739.*

(*h*) Wilbraham v. Snow, 2 Saund. 47; Armory v. Delamirie, 1 Str. 505; Roberts v. Wyatt, 2 Taunt. 268; Legg v. Evans, 6 Mee. & W. 36; * Stephen on Pleading, 354, 5th ed.

(*i*) Gordon v. Harper, 7 T. Rep. 9; Ferguson v. Cristall, 5 Bing. 305; * Leake v. Loveday, 4 Man. & Gr. 972; * Bradley v. Copley, 1 C. B. 685.*

(*k*) Rogers v. Kennay, 9 Q. B. 592.*

(*l*) Armory v. Delamirie, 1 Str. 505; 1 Smith's Leading Cases, 151; Bridges v. Hawkesworth, 15 Jur. 1079.

(1) The finder of a chattel has a special property in it, and may maintain trover against any one who shall convert it, except the true owner. But this rule does not apply to the finder of a chose in action, e. g., a promissory note or lottery ticket; M'Laughlin v. Waite, 9 Cow. R., 670; see Brandon v. Huntsville Bank, 1 Stew. R., 320. It remains to be determined, what is the law on this subject in regard to those securities known on the Stock Exchanges as bonds payable to bearer, with or without coupons, for interest attached to them.

possession is in the finder, until the owner makes his appearance. The owner's property then draws with it the right of possession; and should the finder convert the article found to his own use, he in his turn will be liable to an action of *trover* in respect of the owner's right of possession. Thus, so far as we have already proceeded, we have found nothing more than a simple property in goods, existing with or without the right of possession. The action of *trover* tries the right of possession, and may or may not determine the property. For, strange as it may appear, there is no action in the law of England by which the property in goods is alone decided.

2. But the article in question, instead of being lost and found, may become the subject of *bailment*. Bailment is defined by Sir William Jones, in his admirable and classical Treatise on the Law of Bailment (*m*), to be a delivery of goods in trust, on a contract expressed or implied, that the trusts shall be duly executed, and the goods re-delivered as soon as the trust or use for which they were bailed shall have elapsed or be performed. The term *bailment* is derived from the French word *bailler*, to deliver. The person who delivers the goods is called the bailor; the person to whom they are delivered the bailee. The trusts on which goods may be delivered are various: the principal are the following. They may merely be lent to a friend, or left in the custody of a warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell; or they may be pawned for money lent, or let out to hire (*n*). In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only; and when *any* goods [**26*] are *bailed*, the property still remains in the bailor (*o*). The possession of the goods, however, is evidently for the time being with the bailee. But if while goods are in bailment, a third person should become possessed of them, and should wrongfully convert them to his

(*m*) P. 117.

(*n*) See *Coggs v. Bernard*, 2 Ld. Raym. 909, 912.

(*o*) *Franklin v. Neate*, 13 Mee. & W. 481.*

Possession, whether rightfully or wrongfully obtained, is a sufficient title in the plaintiff, as against a mere stranger or wrongdoer; *Knapp v. Winchester*, 11 Vt. R., 351; *Coffin v. Anderson*, 4 Blackf. R., 395. But not as against the real owner; *Sylvester v. Girard*, 4 Rawle's R., 185.

The finder of a chattel may maintain trover for it; *Clark v. Malory*, 3 Harring. R., 68.

Trover, may be maintained against a stranger, upon a mere prior possession obtained by a purchaser of chattels, under a void execution; *Duncan v. Spear*, 11 Wend. R., 54.

own use, the right to recover possession will in some degree depend upon the nature of the bailment.

If the bailment should be what is called a *simple bailment*, as in the four first instances above mentioned, that is, a bailment which does not confer on the bailee a right to exclude the bailor from possession, in such a case either the bailee or the bailor may maintain an action of trover against the wrong-doer (*p*) (1). The bailee may maintain this action, because the action depends only on the right to the possession which the bailee has by virtue of the bailment made to him (*q*); and the bailor may also maintain the action, because his property in the goods draws with it the right of possession, and the bailment is not of such a kind as to vest this right in the bailee solely. The bailee is rather in the situation of servant to the bailor, and the possession of the one is equivalent in construction of law to the possession of the other. But as it would be unjust that the wrong-doer should pay damages twice over for his offence, the recovery of damages by either bailee or bailor deprives the other of his right of action (*r*). If, however, the bailment should not be of the simple kind, but should confer on the bailee the right to exclude the bailor from the possession, here, though the property in the goods still remains in the bailor, the bailee alone can maintain an action of trover against any person who may have taken the goods and converted them to his own use. Thus the [27] pawnee or hirer of goods *can alone maintain an action of trover so long as the pawning or hiring continues (*s*). Here again we have the property in the goods still vested in one person, the bailor, drawing with it, in the case of simple bailment, the right to the possession, and, in the case of other bailments, temporarily disconnected from that right. If, however, any bailee, whatever be the nature of his bailment, should convert the goods bailed to him to his

(*p*) Nicolls v. Bastard, 2 C. M. & R. 659; * Manders v. Williams, 4 Ex. Rep. 339.*

(*q*) Sutton v. Buck, 2 Taunt. 302.

(*r*) Bac. Abr. tit. Trover (C).

(*s*) Gordon v. Harper, 7 T. R. 9; Burton v. Hughes, 2 Bing. 173; * Ferguson v. Cristall, 5 Bing. 305; * Pain v. Whitaker, Ry. & Moo. 99.

(1) A. of Liverpool shipped goods, which, by the bill of lading, were to be delivered to D. or his assigns, in Philadelphia. The freight was payable in Liverpool, and it appeared that the goods were shipped on account of A. Held, that the bill of lading vested the property in B., who might maintain an action in his own name against the owner of the ship, for the negligent carriage of the goods; Griffith v. Ingledew, 6 Serg. & Raw. R., 429.

own use, he will by that act have determined the bailment; the property in the bailor will draw to it the right to immediate possession, and the Bailor may accordingly recover damages for the act by an action of trover (*t*).

3. The last case requiring notice in which goods may be in the possession of a person who has no property in them, is the case of the existence of a *lien* on the goods. A lien is the right of a person in the possession of goods to retain them until a debt due to him has been satisfied (*u*). A lien is either *particular* or *general*. A particular lien is a right to retain the particular goods in respect of which the debt arises. A general lien is a right to retain goods in respect of a general balance of an account. The former kind of a lien is favoured in law; but the latter, having a tendency to prefer one credit above another, is taken strictly (*x*). A particular lien is given by the common law over goods which a person is compelled to receive; thus carriers (*y*) and innkeepers (*z*) have a lien on the goods in their care; although an innkeeper cannot detain his guest's person, or take his coat off his back, to secure *payment of his bill (*a*). A particular lien is also given by law to every person who by his labour or skill has improved or altered an article entrusted to his care: thus a miller has a lien on the flour he has ground for the cost of grinding (*b*); and a shipwright has a lien on a ship entrusted to him to repair for the costs of repairing it (*c*) (1). So a lien may be claimed for training a

(*t*) Cooper v. Willomatt, 1 C. B. 672.*

(*u*) 2 East, 235; 2 Rose, 357; Smith's Compendium of Mercantile Law, 510.

(*x*) 3 Bos. & Pul. 494.

(*y*) Skinner v. Upshaw, 2 Lord Raym. 752.

(*z*) Thompson v. Lacey, 3 B. & Ald. 283.*

(*a*) Sunbolf v. Alford, 3 Mee. & Wels. 248.*

(*b*) Ex parte, Ockenden, 1 Atk. 235.

(*c*) Franklin v. Hosier, 4 B. & Ald. 341.*

(1) By the civil law, and the general admiralty law; material men have a lien upon the vessel; Domat's Civil Law, book 3, tit. 1, sec. 5.

But by the common law of England, which is binding on the Admiralty Court, those who build, repair, or supply a domestic vessel, have no lien upon the vessel herself, except the common law lien of the mechanic, arising from his mere possession and only co-extensive with such possession; Franklin v. Hosier, 4 B. & A. 341; The Neptune, Cumberlege, 3 Harr., 136, 139; Bland, Ex parte, 2 Rose, 91; The Harmonie, 1 W. Rob., 178; Raitt v. Mitchell, 4 Camp. R., 146; The Brownina, 1 Dodson, 235; The Alexander, Ib. 280; The Zodiac. 1 Harr. 325; The Vibilia; Buxton v. Snee, 1 Vesey, 154; Hoare v. Clement, 2 Show., 338.

horse, because he is improved by the labour and skill thus bestowed upon him (*d*); but no lien can arise merely for his keep (*e*), unless he has been kept by an innkeeper, who is compelled to take him in (*f*). A particular lien also arises in the case of salvage, or rescuing a ship or its lading from the perils of the sea or the queen's enemies, for the trouble and risk incurred (*g*); but this kind of lien does not extend to

(*d*) *Bevan v. Walters*, 1 Moo. & Mal. 236.*

(*e*) *Wallace v. Woodgate*, 1 Ry. & Moo. 293.* See *Sanderson v. Bell*, 2 Cro. & Mee. 304, 311;* 4 Tyr. 244, 252.

(*f*) *Johnson v. Hill*, 3 Stark. 172.*

(*g*) *Hartford v. Jones*, 1 Lord Raym. 393; *Baring v. Day*, 8 East, 57. See *Smith's Compendium of Mercantile Law*, 295.

But under the general admiralty law in England, this country, and elsewhere, mechanics, material men and others, doing work on, or furnishing materials, or supplies, for a foreign vessel, have a lien on such vessel, without any limit as to its duration in point of time; *Justin v. Ballam*, Salk. 34; *Ex parte Shank and others*, 1 Atk. 234; *Wilkins v. Carmichael*, 1 Doug. 101; *Watkinson v. Bernardiston*, 2 Wms. Rep., 367; *Ex parte Halket*, 3 Ves. & B., 135; 2 Rose, 194, 228; *The Ship Fortitude*, 3 Sumner's R., 228; *The Brig Nestor*, 1 Id. 74, 79; *The Schooner Marion*, 1 Story's C. C. R., 68; *Reed v. The Hull of a New Brig*, Id., 246; *Buddington v. Stewart*, 14 Conn. R., 404; *Davis v. A New Brig*, 1 Gilpin's R., 473; *The General Smith*, 4 Wheaton's R., 438; *Shrewsbury v. The Sloop of Two Friends*, Bee's Adm. R., 433; *Gardner v. The Ship of New Jersey*, 1 Peter's Adm. R. 22, 3; *The Jerusalem*, 2 Gallis. R., 345. Although there is no fixed time within which this lien must be enforced, yet it may be lost by negligence or delay, and when the rights of third parties are compromised. Courts of Admiralty will require vigilance in parties who seek their aid, and will not sit to enforce stale and dormant claims; *The Eastern Star*, Ware's R., 186, 212; *Packhard v. The Louisa*, 2 Wood. & M., 48; *The Mary*, 1 Paine's R. 180; *The Margaret*, 3 Harr. R., 238; *The Nestor*, 1 Sumner's R., 87; *Ex parte Foster*, 2 Story's R., 145; *The Rebecca*, Ware's R., 212.

The regular sale of property, under a decree of the Court, gives a good title against all the world, and where the property was affected by a lien, the proceeds are still affected by it in whosoever hands they may be; *Benedict's Adm.*, 309; *Gilpin's R.*, 189, 549; *Gardner v. The Ship New Jersey*, 1 Peters' Adm. R., 223; *The John*, 3 Rob. R., 288.

In many of the states in this country, mechanics and material men, have, by positive statutory enactment, a lien on domestic vessels for work done on, or materials furnished, for such vessel; *Revised Laws of Illinois*, (ed. 1838) 95; *Revised Stat. of Indiana*, (1838) 120; *Louisiana*, Civil code, Art. 2748. A similar law exists in *Missouri*, by statute of 1838; and in *Maine*, by statute of 19 February, 1839. In *Pennsylvania*, the lien continues until the vessel shall have proceeded on the voyage next after the work done, or materials furnished, and no longer; *Purdon's Dig.*, 54. In *New York*, it ceases after twelve days from the departure of the vessel from the port where the debt was contracted, to some other port in the state, and immediately on the vessel leaving the state; *N. Y. Revised Statutes*, Vol. 2, 493, 600. In *New Hampshire*, it exists for four days after the work is completed; *N. Hampshire Compiled Stat.*, 296; In *Florida*, 30 days; *Thompson's Dig.*, 412. In *Connecticut*, *Vermont*, *New Jersey*, *Maryland*, *Ohio*, *Arkansas*, *Mississippi* and *Texas*, no such statute exists.

the saving of property from any other perils than those of the sea (*h*); for goods carried by sea are subject to such peculiar dangers, and the risks incurred in saving them are frequently so great, that principles of public policy have dictated the propriety of giving unusual encouragements to those who may engage in so dangerous a service (*i*).

A general lien, when it does not arise by express contract, or from a contract implied by the course of dealing between the parties (*k*), accrues in consequence of the custom of some trade or profession; and it may be local *also, that is, confined to some particular place (*l*). It obtains in many trades, such as wharfingers (*m*), [*29] dyers (*n*), calico printers (*o*), factors (*p*) (1), policy brokers (*q*), and

(*h*) *Nicholson v. Chapman*, 2 H. Bla. 254.

(*i*) 2 H. Bla. 257.

(*k*) *Simond v. Hibbert*, 1 Russ. & Myl. 719.

(*l*) *Holderness v. Collinson*, 7 Barn. & Cress. 212.*

(*m*) *Naylor v. Mangles*, 1 Esp. 109.

(*n*) *Savill v. Barchard*, 4 Esp. 53. See, however, *Close v. Waterhouse*, 6 East, 523, n.

(*o*) *Weldon v. Gould*, 3 Esp. 268.

(*p*) *Houghton v. Matthews*, 3 Bos. & Pull. 488; *Cowell v. Simpson*, 16 Ves. 280.

(*q*) *Man v. Shiffner*, 2 East, 523.

(1) A factor, is sometimes said to be one, who buys or sells upon commission, or as an agent for others, 3 Kent's Com. (6th Ed.) 622; but more strictly, the term is only applicable to a consignee for sale; Story on Agency, § 111. At least, only such a factor as is last described, has a lien for the general balance of his account against his principal, or, in other words, a general lien; Russell on Factors, 204, 212.

In the year 1755, this right to a lien for the general balance of a factor's account, seems first to have been solemnly adjudged in England, in the case of *Kruger vs. Wilcox*, Ambler 252.

Any agent or broker, however, has a particular lien upon the goods of his principal while in his possession. This lien is a right to retain any article of his principal for some charge or claim growing out of, or connected with, that identical thing; such as for labor, or services, or expenses, upon it; Story on Agency, § 354.

The liens above referred to, whether gen-

eral or particular, are implied by law, unless they have been waived by agreement.

But the general lien of a factor proper is not favored by the law. Thus in *Houghton v. Matthews*, 3 Bos. & Pul. 485, it was held that a general lien did not attach, in respect to a debt which arose prior to the time of the commencement of the relation of principal and factor; and there does not seem to be any authority for extending the lien, over any property of the principal in the hands of the factor, other than that which has been consigned for sale by the former to the latter, so as, for example, to embrace goods purchased by the factor for his principal.

It has been held by Lord Ellenborough, at Nisi Prius, in *Boardman v. Sill*, cited 1 Camp. 410, note, that a factor or broker will lose his lien, if, when the property is demanded of him, he claims to retain it on a different ground than that of the lien—making no mention of it; but the correctness of this decision may well be doubted. But See *White v. Gainer*, 2 Bing. 23.

bankers (*r*), and perhaps also common carriers (*s*). Solicitors and attorneys have also a lien on all the deeds and documents of their clients in their possession for their professional charges generally (*t*); but this doctrine is to be taken in connection with the peculiar nature of title deeds, which being the sinews of the land, follow the seisin of it, and may therefore be held by the client only for a limited interest. Thus, if a tenant for life should leave the title deeds of the land in the hands of his solicitor, the lien of the solicitor for his professional charges would be coextensive only with his client's interest, and on the client's decease the solicitor would be bound to deliver up the deeds to the remainderman, although his charges might remain unpaid (*u*). So if the client should be a mortgagee, the solicitor having the deeds would be bound to deliver them to the mortgagor, on the reconveyance of the property, on payment to the mortgagee of all principal and interest; for on such reconveyance the mortgagee ceased to have any interest in the lands (*x*).

[*30] And in like manner if the client should be a mortgagor, *the solicitor would have no right to retain the deeds as against the prior claim of the mortgagee (*y*): and if the client should be a trustee, the deeds must be given up for the purposes of the trust (*z*). This lien also extends only to charges strictly professional (*a*), and to documents in the possession of the attorney or solicitor in his professional character (*b*); but it has been held that such lien is assignable, together with the debt and documents, to a third person not a solicitor or attorney (*c*). A mere certificated conveyancer has no general lien on the documents in his hands (*d*).

Lien, then, of whatever kind, is merely a right to retain the *possession* of the goods. This right of possession enables the person who

(*r*) *Davis v. Bowsher*, 5 T. R. 488; *Brandao v. Barnett*, 3 C. B. 519, 530.*

(*s*) See *Rushforth v. Hadfield*, 6 East, 519; 7 East, 224; *Aspinall v. Pickford*, 3 Bos. & Pul. 44, note.

(*t*) *Stevenson v. Blakelock*, 1 Mau. & Sel. 535; *Ex parte Sterling*, 16 Ves, 258; *Ex parte Pemberton*, 18 Ves. 282.

(*u*) *Davies v. Vernon*, 6 Q. B. 443, 447.*

(*x*) *Wakefield v. Newbon*, 6 Q. B. 276.*

(*y*) *Smith v. Chichester*, 2 Dr. & War. 393; *Blunden v. Desart*, id. 405; *Petty v. Wathen*, 7 Hare, 351.

(*z*) *Baker v. Henderson*, 4 Sim. 27.

(*a*) *The King v. Sankey*, 5 Ad. & Ell. 423*; *Worrall v. Johnson*, 2 Jac. & Walk. 218.

(*b*) *Champernown v. Scott*, 6 Madd. 93; *Balch v. Symes*, T. & Russ. 87.

(*c*) *Bull v. Faulkner*, 2 De. G. & S. 772, sed qu.

(*d*) *Hollis v. Claridge*, 4 Taunt. 807; *Steadman v. Hockley*, 15 Mee. & Wels. 553.*

has been in possession by virtue of the lien to maintain an action of trover for the goods(*e*); but the *property* in the goods still remains with the owner; and if the person having the lien should give up the possession of the goods, his lien will be lost(*f*); the owner's property in them will draw to it the right of possession, and enable him to maintain an action of trover(*g*). And if the person having the lien should take a security for his debt, payable at a distant day, his lien would on that account be lost, as it would be unreasonable that he should detain the goods till such future time of payment(*h*); and in this case also an *action of trover may be maintained by the owner of the goods, by virtue of the right of possession now accrued to him [*31] in respect of his property(*i*).

In all the above cases of finding of goods, bailment and lien, it appears clear, therefore, that the property in the goods is still simply vested in one party only, although the right to their immediate possession may be in another party, and the actual possession possibly in a third.

*CHAPTER III.

[*32]

OF THE ALIENATION OF CHoses IN POSSESSION.

CHoses in possession have always been freely alienable from one person to another. The feudal principles of tenure, which in ancient times opposed the alienation of landed estates, could have no application to the then insignificant subjects of personal property; although the full right of testamentary disposition was not, as we shall hereafter see, enjoyed in early times. But, though the property in personal chattels may be freely aliened, it is impossible for a man to make a valid grant in law of that in which he has no actual or potential property, but which he only expects to have(1). A person who has an

(*e*) *Legg v. Evans*, 6 Mee. & Wels. 36.*

(*f*) *Kruger v. Wilcox*, Amb. 254.

(*g*) *Sweet v. Pym*, 1 East, 4.

(*h*) *Cowell v. Simpson*, 16 Ves. 275.

(*i*) *Hewison v. Guthrie*, 2 New Cas. 756, 759.*

(1) An agreement to sell a chattel which a future time, when finished, is an executory contract, upon which a present pro-

interest in land may grant all the fruit which may grow upon it hereafter (a). So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool (b). But a grant of the wool of all the sheep which a man ever

(a) *Grantham v. Hawley*, Hob. 132; *Petch v. Tutin*, 15 Mee. & Wels. 110.*

(b) *Per Pollock*, C. B. 15 Mee. & Wels. 116.*

perty does not pass, though an action will lie for a breach of the agreement; *Pritchett v. Jones*, 4 Rawle's R. 260. When therefore A., (a tanner in the country,) on the 31st of July, 1828, in consideration of a pre-existing debt, contracted to sell to B., (a currier in the city,) a quantity of hides and skins, then in the vats of the vendor, undergoing the process of tanning, but which were susceptible of immediate delivery, and agreed to deliver them on or before the 12th of November following; some of them at fixed prices, and others at the market price, to be passed to the credit of A., to settle his account. It was held, that no immediate property vested in B., and that the goods were liable to execution as the property of A., notwithstanding that the transaction was an open one, and there was proof that it had long been the course of business, for curriers in the city to purchase leather of tanners in the country while in process of manufacture, to be delivered when tanned, and that advances were frequently made on such purchases. *Ibid.*

A sale is an executed contract, to constitute which delivery in fact, or in law, is indispensable, and it cannot be given of a thing which has not yet fully come into existence; *Clemens v. Davis*, 7 Barr's R. 263. But, where a contract is made for the purchase of an article to be delivered when finished, and afterwards while the article is still in an unfinished state, the original contract is abandoned, and the purchaser agrees to take the article as unfinished, a delivery under the new contract is good as against an execution subsequently levied. *Ibid.*

A contract by a merchant to deliver hides to a tanner, to be charged at cost and five per cent. commission, and interest after six months, and when tanned to be returned to the merchant to be sold by him, and out of the sale the first cost and five per cent. to be deducted, and the balance to be paid to the manufacturer, is such a sale, as will subject the hides to levy as the property of the manufacturer; *Jenkins v. Eichelberger*, 4 Watts R. 121.

An agreement whereby goods are consigned by A. to B., to be sold at not less than the invoice prices, the invoice prices to be paid over to A., and all that the goods should sell for above those, to be retained by B., and such portion of the goods as remained to be returned to A., does not vest the property in B.; *McCullough v. Porter*, 4 Wat. & Serg. R. 179.

A coal company agreed with a contractor, to sell him a scow-boat on the conditions expressed in the company's printed regulations, one of which was, that the company would furnish its contractors with boats for cash at cost, or on credit, with interest, but that the ownership should remain in the company till all the instalments of the price were paid, when a bill of sale should be made out; the company were to pay the tolls, and the contractor to take freight from no other quarter. The boat still continued in the register of the company; its original number being painted in letters and figures on the stern, and was in no way distinguishable from the other boats of the company. Held, that the property did not pass as against creditors of the contractors, until the boat was paid for; *Lehigh Co. v. Field*, 8 Wat. & Serg. R. 232.

shall have, is void (*c*). And in the same manner the assignment of a man's stock in trade passes only such articles as are his property at the time he executes such assignment, and will not comprise any other articles which he may afterwards purchase (*d*); not even if the instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling house (*e*).

* The manner in which the alienation of personal chattels is effected, is in many respects essentially different from the modes of conveying real estate. In ancient times, indeed, there was more similarity than there is at present. The conveyance of land was then usually made by feoffment, with livery of seisin, which was nothing more than a simple gift of an estate in the land, accompanied by delivery of possession (*f*). This gift might then have been made by mere word of mouth (*g*); but the Statute of Frauds (*h*) made writing necessary; and now every conveyance of landed property is required to be by deed (*i*). Personal chattels, on the contrary, are still alienable by mere *gift and delivery*; though they may be disposed of by *deed*; and they are also assignable by *sale*, in a manner totally different from the conveyance requisite on the transfer of real estate (1). Each of these three modes of conveyance deserves a separate notice. [*33]

1. And first, personal chattels are alienable by a mere gift of them, accompanied by delivery of possession. For this purpose no deed or writing is required, nor is it essential that there should be a consideration for the gift. Thus, if I give a horse to A. B., and at the same time deliver it into his possession, this gift is complete and irrevocable, and the property in the horse is thenceforward vested in A. B. (*k*). But if I purport to assign the horse, and yet retain the possession, the

(*c*) Com. Dig. tit. Grant (D).

(*d*) Tapfield v. Hillman, 6 Man. & Gr. 245; * S. C. 6 Scott, N. R. 967.

(*e*) Lunn v. Thornton, 1 C. B. 379; * Gale v. Burnell, 7 Q. B. 850.*

(*f*) See Principles of the Law of Real Property, 113, 2nd ed.; 118, 3rd ed.

(*g*) Ibid. p. 117, 2nd ed.; 122, 3rd ed.

(*h*) Stat. 29 Car. II. c. 3, ss. 1, 2.

(*i*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*k*) 2 Black. Com. 441.

(1) By the law of Pennsylvania, the title chattels, without a written bill of sale; to a ship, passes by actual sale and delivery. Weaver v. The Susan G. Owens, 1 Wall. very, as in the case of other personal property. Jr. R. 366.

gift, though made by writing, (so that it be not a deed), is absolutely [*34] void at law (*l*), and equity will give no relief to the donee (*m*). *It may however be observed, that if the doner should not attempt to part with the subject of gift, but should declare that he keeps possession of it *in trust* for the donee, equity will seize on and enforce this trust, although voluntarily created (*n*). In some cases it is not possible to make an immediate and complete delivery of the subject of gift; and in these cases, as near an approach as possible must be made to actual delivery; and if this be done, the gift will be effectual. Thus if goods be in a warehouse, the delivery of the key will be sufficient (*o*); timber may be delivered by marking it with the initials of the assignee (*p*), and an actual removal is not essential to the delivery of a haystack (*q*). But the delivery of a part of goods capable of actual delivery, is not a sufficient delivery of the whole (*r*)(1).

(*l*) *Irons v. Smallpiece*, 2 Barn. & Ald. 551; *Miller v. Miller*, 3 P. Wms. 356. See also *Shower v. Pilck*, 4 Ex. Rep. 478.*

(*m*) *Antrobus v. Smith*, 12 Ves. 39, 46; *Edwards v. Jones*, 1 My. & Cr. 226; *Dillon v. Coppin*, 4 My. & Cr. 647, 671.

(*n*) *Ellison v. Ellison*, 6 Ves. 656; *Ex parte Dubost*, 18 Ves. 140, 150.

(*o*) *West v. Skip*, 1 Ves. sen. 244; *Ryall v. Rowles*, 1 Ves. sen. 362; 1 Atk. 171; *Ward v. Turner*, 2 Ves. sen. 443.

(*p*) *Stoveld v. Hughes*, 14 East, 308.

(*q*) *Chaplin v. Rogers*, 1 East, 190.

(*r*) *Per Pollock*, C. B., 14 Mee. & Wels. 37,* correcting a dictum of Taunton, J., 2 Ad. & El. 73.*

(1) Where there is a contract for a finished article as a steam engine, a delivery of its various parts as they are made, will not change the property; *Shell v. Heywood*, 4 Har. R. 429. This was the case of a contract entered into with machinists, for the construction of a steam engine and fixtures for a grist mill; portions of the machinery, viz., the boilers and balance-wheel, were delivered, and the boilers fixed in a building attached to the mill. The purchaser became embarrassed, and in an agreement in writing between him and the attorney of the manufacturers, it was stated that the boilers, and the machinery attached, or to be attached to them, were the property of the manufacturers, and they, by their attorney, agreed to leave the same where they were for three months, in order to give time to the purchaser to make an arrangement with his creditors; and in the event of this inability to make such arrangement, then the manufacturers were to be left to their legal remedy for the materials already furnished, or to the removal of the same, at their option. The sheriff subsequently levied on and sold the boilers and wheel, under an execution against the mill owner, as personal property, notwithstanding notice given to him of the claim of the machinists. Held, that the property had remained in the latter, and that trespass would lie by them against the sheriff, for selling the machinery. *Ibid*.

Where A, agreed to furnish B with a machine, to be put up by A in the mill of B, B to cart the machine to the mill, and if B was satisfied with the way it worked, to pay for it, otherwise, A to take it away,

When goods are in the custody of a simple bailee, such as a wharfinger or carrier, the possession of such bailee is, as we have seen(s), constructively the possession of the bailor; and either the bailor or bailee may maintain an action of trover in respect of the goods. This constructive possession of the bailor may be delivered by him to a third person, by making as near an approach to actual delivery as is possible under the circumstances of the case. By the custom of Liverpool the delivery of goods in another person's warehouse is effected by merely

(s) Ante, p. 26.

and, before it was entirely put up, it was tried and found not to work satisfactorily, and on the same day was attached as the property of B, it was *held* that the property had not been transferred; *Phelps v. Willard*, 16 Pick. R. 29. A delivered cotton yarn to B, on a contract that the same should be manufactured into plaids; B was to find the filling, and was to weave so many yards of the plaids, at 15 cents per yard, as was equal to the value of the yarn at 65 cents per pound. Held, that, by the delivery of the yarn to B, the property thereof vested in him; *Buffum v. Merry*, 3 Mason's R. 478. Where one contracted to burn a kiln of bricks, for which he was to receive 10,000 of them when burnt, and he performed his part of the contract, it was *held*, that he had no vested interest in the bricks, which his creditor could attach, till actual or constructive delivery; *Brewer v. Smith*, 3 Greenl. R. 44. A contract was made in France between A and B, by which certain goods were to be procured to be manufactured by A, and transmitted by him through B's agents at Havre, with instructions as to their further transmissions; two cases of goods were sent to Havre, and forwarded by B's agents, with bills of lading, in one vessel, the invoice of one of the cases having been sent by a previous vessel. The latter case, having arrived in a different vessel from that in which the invoice was sent, was not claimed, and was sent to the public storehouse, where it was burnt. Held, that there was no

sale by A to B, but only a contract to deliver goods; *Low v. Andrews*, 1 Story's R. 38.

It is true, that the sale of a thing not in existence, is, upon general principals inoperative, being merely executory, and when the thing afterwards to be produced, is the product of land, or anything of like nature, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract; *Smith v. Atkins*, 18 Vt. (3 Washb.) R. 461. When the owner of coal pits, which were in process of burning, sold the charcoal which might be taken therefrom, at a specified price for each 100 bushels, and agreed that he would complete the burning and draw the coal to the vendee's place of business, and the vendor accordingly continued to have charge of the coal until it was attached by his creditors, before it had been measured and delivered to the vendee, it was held, that the vendee acquired by the contract no property in the coal, even as between himself and the vendor; *Hale v. Huntley*, 21 Vt. (6 Washb.) R. 147.

A contract was made with a coachmaker, to make a buggy for a specified price, and, before the completion of the buggy, the parties came to a settlement, and the price was paid, with an understanding that it was to be finished, and then delivered. Held, that the property in the buggy vested in the purchaser from the time of the payment of the money; *Butterworth v. McKinly*, 11 Humph. R. 206.

[*35] handing over a delivery order (*t*); and the property in wines *in the London Docks appears to pass by the indorsement and delivery of the dock warrant (*u*). But in the absence of a custom to the contrary, it would seem that there can be no legal delivery of goods in the hands of a third person without the consent of the warehouseman or wharfinger in whose custody the goods are (*x*). When goods are at sea, the delivery of the bill of lading, after its endorsement, is a delivery of the goods themselves (*y*); for it is not possible, in this case, to make any nearer approach to an actual delivery (*z*).

2. The next method of alienating chattels personal is by deed. Every deed imports a consideration (*a*); for it was anciently supposed, that no person would do so solemn an act as the sealing and delivery of a deed without some sufficient ground. The presence of this implied consideration renders a deed sufficient of itself to pass the property in goods (*b*). It supplies on the one hand the want of delivery, and on the other the want of that actual consideration which always exists in the third and most usual mode of alienation of chattels personal, which is,

3. By sale. It is in this last and most usual method of alienation that the contrast presents itself between the means to be employed for the alienation of real property and chattels personal. When a contract has been entered into for the sale of lands, the legal estate in [*36] such lands still remains vested in the vendor; and it is not *transferred to the vendee until the vendor shall have executed and delivered to him a proper deed of conveyance. In *equity*, it is true, that the lands belong to the purchaser from the moment of the signature of the contract; and from the same moment, the purchase-money belongs, in equity, to the vendor (*c*). But at *law* the only result

(*t*) *Dixon v. Yates*, 5 Barn. & Adol. 313; * and see *Greaves v. Hepke*, 2 Barn. & Ald. 131.

(*u*) *Ex parte Davenport*, Mon. & Bl. 165.

(*x*) *Zwinger v. Samuda*, 7 Taunt. 265; * *Lucas v. Dorrien*, *ibid.* 278; *Bryans v. Nix*, 4 Mee. & Wels. 775, 791; * *M'Ewan v. Smith*, 2 H. of L. Cases, 309.

(*y*) *Mitchel v. Ede*, 11 Ad. & Ell. 888.*

(*z*) 1 Ves. sen. 362; 1 Atk. 171.

(*a*) *Plowd.* 308; 3 Burr. 1639; 1 Fonb. Eq. 342; 2 Fonb. Eq. 26; *Principles of the Law of Real Property*, 118, 2nd ed.; 123, 3rd ed.

(*b*) *Carr v. Burdiss*, 1 C. M. & R. 782, 788; * S. C. 5 Tyrw. 309, 316.

(*c*) *Principles of the Law of Real Property*, 133, 2nd ed.; 137, 3rd ed.

of the signature of a contract for the sale of lands is, that each party acquires a right to sue the other for pecuniary damages, in case such contract be not performed. Not so, however, the case of a contract for the sale of chattels personal. Such a contract immediately transfers the legal property in the goods sold from the vendor to the vendee, without the necessity of anything further (*d*). In order to this, it is of course necessary that the transaction have within itself all the legal requisites for a sale; and these requisites will accordingly form the next subject for our consideration (*e*).

The requisites for the sale of goods partly depends upon their value. Goods under the value of 10*l*. sterling may now be sold in the same manner as goods of whatever value were anciently saleable; whereas, goods of the value of 10*l*. or upwards are now regulated in their sale by an enactment contained in the Statute of Frauds (*f*)(1). And first, with regard to such goods and chattels as do not fall within this enactment, there can be no sale without a tender or part payment of the money, or a tender or part delivery of the goods, unless the contract is to be completed at a future time. Thus if A. should agree to pay so much for the goods, and B., the owner, should agree to take it, and the parties should then separate *without anything further [*37] passing, this is no sale (*g*). But if A. should tender the money, or pay but a penny of it, or B. should tender the goods, or should deliver any, even the smallest portion of them, to A., or if the payment or delivery, or both, should be postponed by agreement till a future day, the sale will be valid, and the property in the goods will pass at once from the vendor to the vendee (*h*). If, however, any act should remain to be done on the part of the seller previously to the delivery of the goods, the property will not pass to the vendee until such act shall have been done. Thus if goods, the weight of which is unknown, are sold by weight (*i*), or if a given weight or measure is sold out of a

(*d*) Com. Dig. tit. Biens (D 3).

(*e*) In the recent case of *Thompson v. Pettit*, 10 Q. B. 101,* the property in goods was held to pass by a mere written memorandum by way of *mortgage*, without any delivery; *sed qu*.

(*f*) 29 Car. II. c. 3, s. 17.

(*g*) 2 Bla. Com. 447; *Smith's Merchantile Law*, 436.

(*h*) *Shep. Touch.* 224; *Martindale v. Smith*, 1 Q. B. 389. 395.*

(*i*) *Hanson v. Meyer*, 6 East, 614; *Swanwick v. Sothern*, 9 Ad. & Ell. 895.*

(1) See post p. 38, note (2).

larger quantity (*j*), the property will not pass to the vendee until the price shall have been ascertained by weighing the goods in the one case, or the goods sold shall have been separated by weight or measure in the other (*i*). So if an article be ordered to be manufactured, the

(*j*) *Busk v. Davis*, 2 Mau. & Selw. 397; *Shepley v. Davis*, 5 Taunt. 617.*

(1) The title to goods sold, will not pass from vendor to vendee, without actual or constructive delivery of the same; *Outwater v. Dodge*, 7 Cow. R. 85. What will amount to a constructive delivery, is a question of fact to be ascertained by evidence, and certain rules of law; *Hondlette v. Tallman*, 14 Maine R. 400; *Smith v. Craig*, 3 Wat. & Serg. R. 14.

As a general rule, the goods sold, must be ascertained and designated, and for this purpose, where they form a part of a stock, or are mixed with any quantity of like goods, they must be separated therefrom before the property in them can pass; and generally, if anything remains to be done to goods for the purpose of ascertaining their price, such as weighing, measuring, or testing them, the price depending upon their quality or quantity, the performance of these acts, would seem to be a condition precedent to the transfer by a sale of the property in them, although the individual goods be ascertained; *Hutchinson v. Hunter*, 7 Barr's R. 140; *Hale v. Huntley*, 21 Vt. R. 50; *Stevens et al. v. Ewe*, 10 Barb. S. R. 95; *Dixon v. Myers et al.*, 7 Gratt., R. 240.

Thus, where goods were partly measured off, and subsequently stolen, those measured were held to be the property of the buyer, and the remainder belonged to the seller; *Crawford v. Smith*, 7 Dana's R. 59; and the fact that a part of the price has been paid, will not alter the circumstances, so as to make the contract complete, provided there is still something to be ascertained; *Rapelye v. Mackie*, 6 Cow. R. 250; even in a case where the vendee had re-sold the goods before they had been separated, it was held, that the property

had not passed from the original vendor; *Hunter v. Hutchinson*, 7 Barr's R. 140. When, however, a horse was sold at a certain price, or such other price as a third person should name, and the third party refused to name a price, it was held, that the sale was determined at the sum mentioned by the parties; *Holingsworth v. Bates*, 2 Blackf. R. 340; so, too, in the case of a sale of 625 bags of corn, part of a larger lot, being the 625 bags which should first arrive in port, it was held, that this was a sufficient separation to pass the title to the 625 bags; *Sahlman v. Mills*, 3 Strobb. R. 384.

Where a paper manufacturer sold 2000 pieces of wall paper, a part of a larger lot, all of the same size, description and value, and the purchaser paid the price, and took away at the time 1000 pieces, it being agreed that the other 1000 should remain until called for, but were not selected by the buyer, nor separated and set aside for him. It was held, that no property passed; and that, even if there had been no other pieces on hand than those in the particular lot, and no more than the exact number, they would not have passed without a specific act of appropriation, equivalent to a delivery in contemplation of law. But if the paper had been sold in a separate lot, or in gross, or if the pieces had been separated from the rest, and pointed out to the buyer as his 2000, the property would have passed, though there had been a small excess; *Golder v. Ogden*, 3 Har. R. 528.

In determining when the title to goods which are the object of a contract, passes, regard is of course to be had to the intention of the parties, and if by anything it appears that it was designed that the title

property in it will not vest in the person who gave the order, until it shall, with his assent, have been appropriated for his benefit (*k*)(1).

But with regard to goods of the value of 10*l.* or upwards, additional requisites have been enacted by the seventeenth section of the Statute of Frauds (*l*), which provides "that no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the *bargain, or in part of payment, or [38] that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." (2) And by a modern

(*k*) *Atkinson v. Bell*, 3 B. & Cress. 277; * *Wilkins v. Bromhead*, 6 Man. & Gr. 963, 973.*

(*l*) 29 Car. II. c. 3.

should pass, notwithstanding there was still something to be done, the contract will be determined in accordance with that intention; *Amber v. Hamlet*, 12 Pick. R. 76; *Leedom v. Phillips*, 1 Yeates' R. 529; *Bowen v. Burk*, 1 Har. R. 148; *Clemens v. Davis*, 7 Barr's R. 263; *Riddle v. Varnum*, 20 Pick. R. 280; *Harris v. Smith*, 3 Serg. & Raw. R. 20; *Denis v. Alexander*, 3 Barr's R. 50.

Even the converse of the proposition, that delivery actual or constructive, is necessary to pass title where goods are sold, is not always true, for in the case of an actual delivery of personal chattels after sale, the property may not pass, as when, for instance, the delivery has been conditional; *Andrew v. Dieterick*, 14 Wend. R. 31; *Davis v. Hill*, 3 N. H. R. 382; *Young v. Austin*, 6 Pick. R. 280; *Bennett v. Platt*, 9 Id. 558; *Lester v. McDowell*, 6 Har. R. 91; *Outwater v. Dodge*, 7 Cow. R. 85; *Riddle v. Varnum*, 20 Pick. R. 280; *Houlette v. Tallman*, 14 Maine R. 400; *Devane v. Fennell*, 2 Ired. L. R. 36.

As a general test of the transfer of the title of goods by a sale, it is only necessary to inquire whether the vendee can bring

trover or replevin for them, or take them into his possession, without committing a trespass; *Lester v. McDowell*, 6 Har. R. 91; *McDowell v. Hewett*, 15 Johns. R. 349; *Smith v. Smith*, 5 Barr's R. 254; *Leedom v. Phillips*, 1 Yeates' R. 529. See also, generally, *Eagle v. Eichelberger*, 6 Wat. R. 29; *Brewer v. Smith*, 3 Greenlf. R. 44; *Mason v. Thompson*, 18 Pick. R. 305; *Barnard v. Poor*, 21 Id. 378; *Dunlap v. Berry*, 4 Scam. R. 327; *Frazier v. Hilliard*, 2 Strobb. R. 309; *Williams v. Allen*, 10 Hump. R. 337; *Lehigh Co. v. Field*, 8 Wat. & Serg. R. 232; *Macomber v. Parker*, 13 Pick. R. 175; *Scott v. Wells*, 6 Wat. & Serg. R. 357; *Waldo v. Belcher*, 11 Ired. R. 609.

(1) See ante, note (1), p. 34.

(2) The provision of the English Statute of Frauds, on this subject, is in force in South Carolina and Georgia. (*Cason v. Cheely*, et al., 6 Geo. R. 554;) and in many of the States of the Union, analogous laws are in operation, by which contracts for the sale of chattels, beyond a certain value, are declared void, unless there be delivery, or earnest, or the contract be in writing; thus, in Arkansas, Maine and

statute (*m*), this enactment "shall extend to all contracts for the sale of goods of the *value* of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

The above section of the Statute of Frauds has been interpreted by a vast number of cases decided on almost every one of the phrases it contains (*n*). The chief difficulty has been to determine the exact meaning of the acceptance of part of the goods and actual receipt of the same, required on the part of the buyer, and to ascertain in each particular case whether such acceptance and actual receipt have taken place or not. The acceptance required appears not to be necessarily such as shall preclude the purchaser from afterwards objecting to the quality of the goods (*o*). Actual receipt seems, according to a great preponderance of authority, to mean receipt of the *possession* of the goods, and to be merely correlative to delivery of possession on the part of the vendor (*p*). There must, therefore, be an actual transfer of the article sold, or some part thereof, by the seller, and an actual [*39] taking possession of it by the buyer (*q*). *The possession of a simple bailee is, however, as we have seen (*r*), constructively the possession of the bailor. If, therefore, any part of the goods be delivered to an agent of the vendee, or to a carrier named by him, this is a sufficient receipt by the vendee himself (*s*); and if the goods should be in the possession of a warehouseman or wharfinger at the

(*m*) Stat. 9 Geo. IV. c. 14, s. 7. See *Hoadley v. McLaine*, 10 Bing. 482, 486.*

(*n*) See *Smith's Merchantile Law*, 443 *et seq.*

(*o*) *Morton v. Tibbett*, 15 Q. B. 428; * *Bushel v. Wheeler*, 15 Q. B. 442; *sed qu.**

(*p*) *Smith's Merchantile Law*, 447, n. (*s*) *Saunders v. Topp*, 4 Ex. Rep. 390.*

(*q*) *Baldey v. Parker*, 2 B. & Cress. 37, 41.*

(*r*) *Ante*, p. 26.

(*s*) *Dawes v. Peck*, 8 T. Rep. 330.

New Jersey, this sum is fixed at \$30; in land, Mississippi, Ohio, Pennsylvania and Massachusetts, Michigan and New York, at \$50; in New Hampshire at \$33 33; in Virginia, the English Statute, respecting the sale of chattels above the value of 10*l.*, is not in force; nor does it apply in North Vermont, at \$40; and in California, at \$200; while in Florida, all contracts, for the sale of personal property, no matter what may be the value, must be in writing. Carolina or Texas, to any other personal property than slaves, and to that species of property it is applicable without regard to their value.

time of sale, the receipt by the purchaser of a delivery order, provided it were coupled with the assent of the bailee, would be a sufficient receipt of the goods within the statute (*t*). The wharfinger holds the goods as the agent of the vendor, until he has agreed with the purchaser to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the purchaser, and the possession of such wharfinger is that of the purchaser; and then only is there a constructive delivery to him (*u*).

The requisitions of the statute, it will be observed, are in the alternative. Either the buyer must accept part of the goods sold, and actually receive the same, *or* he must give something in earnest or in part of payment, *or* some note or memorandum in writing must be signed. The two former alternatives are left as they were before the statute; but the last is a new requisition, which must be observed in the absence of either of the former. The effect of the statute, therefore, is to abolish tender and mere words as sufficient for a sale, and to substitute for them the more exact evidence of a note or memorandum in writing (*v*). But as the memorandum may be signed by an agent lawfully authorized, the *bought-and-sold notes given by a broker [**40*] are a sufficient memorandum within the meaning of the statute (*x*). And it is held that the entry of a purchaser's name by an auctioneer's clerk at an auction is also sufficient to satisfy the statute, as the clerk is, for that purpose, the authorized agent of the purchaser (*y*). But one of the contracting parties to a sale cannot be the agent of the other for the purpose of signing a memorandum of the bargain (*z*).

If the agreement is not to be performed within the space of one year from the making thereof, then, however small be the value of the goods, no action can be brought upon it, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him

(*t*) *Bentall v. Burn*, 3 B. & Cress. 423.* See ante, p. 35.

(*u*) *Farina v. Horne*, 16 M. & W. 119, 123.*

(*v*) Every memorandum, letter or agreement made for or relating to the sale of any goods, wares or merchandize, is exempt from all stamp duty; stat. 55 Geo III. c. 184, Sched. Part I. tit. Agreement.

(*x*) *Grove v. Aflalo*, 6 B. & Cress. 117.*

(*y*) *Bird v. Boulter*, 4 B. & Adol. 443.*

(*z*) *Farebrother v. Simmons*, 5 B. & Ald. 333.*

lawfully authorized. This is another provision of the Statute of Frauds(a), and will be hereafter noticed more particularly.

Although the property in goods sold passes, as we have seen (b), from the vendor to the vendee, immediately upon the execution of a valid contract for sale, yet the possession of the goods of course remains with the vendor until he deliver them, which he is bound to do when the purchaser is ready to pay the price (c), but not before (d). And so long as the vendor retains actual or constructive possession of the goods, he has a lien upon them for so much of the purchase-money as may remain unpaid (e). But when the goods are once delivered by the [41] *vendor out of his own actual or constructive possession, his lien is gone; for lien in law is, as we have seen (f), merely a right to retain possession, and not to recover it when given up.

Under certain circumstances, however, the vendor of goods has a right to resume their possession, with which he had previously parted under a contract for sale. This right is called the right of *stoppage in transitu*; and it occurs when goods are consigned entirely or partly (g) on credit from one person to another, and the consignee becomes bankrupt or insolvent (1) before the goods arrive. In this event, the consignor (h) has a right to direct the captain of the ship, or other carrier,

(a) 29 Car. II. c. 3, s. 4.

(b) Ante, p. 36.

(c) Rawson v. Johnson, 1 East, 203.

(d) Bloxam v. Sanders, 4 Barn. & Cress. 941.*

(e) Dixon v. Yates, 5 Barn. & Adol. 313; * Lackington v. Atherton, 7 Man. & G. 360.*

(f) Ante, p. 27.

(g) Hodgson v. Loy, 7 T. R. 440.

(h) Bird v. Brown, 4 Ex. Rep. 786.*

(1) Three circumstances must concur, *Covell v. Hitchcock*, 23 Wend. R. 611, S. C. 20, Id. 167; *Mottram v. Heyer*, 1 Denio's R. 483, S. C. 5 Id. 629; *Sawyer v. Joslin*, 20 Vt. R. 172; *Frazier v. Hilliard*, 2 Strobh. R. 309; *Donath v. Broomhead*, 7 Barr's R. 301.

1st. The vendee must have become insolvent. It is only where the vendee becomes insolvent after the sale has been effected, and before delivery, that the right of *stoppage in transitu* exists. If the vendee was insolvent at the time of the consignment, whether that fact be known or unknown

to deliver the goods to himself or his agent instead of to the consignee, who has thus become unable to pay for them. The right of stoppage in transitu was first allowed and enforced only by the Court of Chan-

to the consignor, the right of retaking the goods does not exist; *Rogers v. Thomas*, 20 Conn. R. 53; *Buckley v. Furness*, 15 Wend. R. 137; *Naylor v. Dennie*, 8 Pick. R. 198. To constitute insolvency, it is not necessary that the consignees should have been declared bankrupt, or taken the benefit of the insolvent laws; any competent evidence that will satisfy a jury is sufficient; *Hays v. Monelle*, 2 Harr. R. 48. But there must be some visible change in the pecuniary situation of the vendee, and some open notorious act on his part, calculated to affect his credit; some change in his apparent circumstances, which would operate as a surprise on the vendor, and which, if he had known, he would not have given credit to the vendee; *Rogers v. Thomas*, 20 Conn. R. 63. The fact of the goods having been sold on credit, will not deprive the consignor of his right; *Ilsley v. Stubbs*, 9 Mass. R. 65; *Stubbs v. Lund*, 7 Id. 453; *Newhall v. Vingas*, 1 Shep. R. 93; nor charging commission for doing the business, nor the acceptance of part payment; nor is he obliged to refund the payment or pay the freight.

2d. The purchase money must not have been paid—but the taking of bills on the vendee, drawn by his agent, will not defeat the right.

3d. The *transitus* of the goods, must not have been determined by delivery to the vendee, either actual or constructive.

The question of delivery, is often difficult to determine, and must necessarily depend to a certain extent, upon the interpretation of the contract in each particular case; but it has been held, that, the delivery to the vendee of a bill of sale, will defeat the vendor's right of stopping the goods, *Davis v. Bradley*, 24 Vt. R. 55; *Ridgway v. Bowman*, 7 Cush. R. 268; and, where the vendee intercepted the goods on their passage, before they had reached their ultimate

destination, and took possession of them, it was held that the delivery was complete, *Jordan v. James*, 5 Ham. R. 88; on the other hand, if the goods on the passage be seized by a creditor of the purchaser, that will not deprive the vendor of his right of stoppage, *Buckley v. Furness*, 15 Wend. R. 137; and, although goods may come to the hands of a carrier of a purchaser, at a point intermediate between the residences of the vendor and vendee, that will not be considered such a delivery to the vendee, as to deprive the vendor of his right, *Buckley v. Furness*, 15 Wend. R. 137; so, of the possession of a warehouseman, at a point intermediate between consignor and consignee, even though it may be mentioned as the place where the goods are to be sent; provided it is not their ultimate destination, *Covell v. Hitchcock*, 23 Wend. R. 611, S. C. 20 Id. 167; even where the goods, transported by water, were in the port where the vendee resided, and had been there attached by creditors, but had not yet come to the actual possession of the vendee, it was held that the right of stoppage remained, *Naylor v. Dennie*, 8 Pick. R. 198; but unless it is provided in the bill of lading, that the consignee shall have possession at the conclusion of the voyage, the right of stoppage is concluded on the shipment, *Stubbs v. Lund*, 7 Mass. R. 453.

But where before the delivery of the goods, they have been *bona fide*, sold by the original purchaser, so that all the right is in a third person, it has been held that the vendor's right of stoppage is gone; thus, a *bona fide* assignment by endorsement of the bill of lading, will defeat the original vendor's right, *Stanton v. Eager*, 16 Pick. R. 467; *Stubbs v. Lund*, 7 Mass. R. 453; *Ilsley v. Stubbs*, 9 Id. 65; *The Mary Ann Guest*, 1 Blatch. R. 358; *Walton v. Ross*, 2 Wash. C. C. R. 283.

cery, which, in the exercise of its equitable jurisdiction, considered that, under the circumstances above mentioned, it was very allowable in equity for the consignor to get his goods again into his own hands (*i*). But the right was subsequently acknowledged by the courts of law; and it is now constantly enforced by them. As this right was originally of equitable origin, it cannot be expected to depend on strictly legal principles; and the doctrines of law on this particular subject are in fact unlike its usual doctrines on other matters. Thus it is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not, or that a second purchaser should stand in a better position than his vendor (*j*); but the [*42] consignee of goods may, by endorsing the bill of lading *to a *bonâ fide* indorsee, defeat the consignor's right to stop in transitu (*k*). So a delivery of goods into the possession of a carrier appointed by the vendee is, in construction of law, a delivery to the vendee himself, and divests the vendor's lien for the unpaid purchase-money (*l*); but until the *transitus* is completely ended, or the goods

(*i*) *Wiseman v. Vandeputt*, 2 Vern. 203; *Snee v. Prescott*, 1 Atk. 245.

(*j*) *Dixon v. Yates*, 5 Barn. & Adol. 339.*

(*k*) *Lickbarrow v. Mason*, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21; 1 Smith's Leading Cases, 388; *Jenkyns v. Osborne*, 7 Man. & Gr. 678, 699.*

(*l*) *Dawes v. Peck*, 8 T. R. 330, ante, p. 39; *Wilmshurst v. Bowker*, in error, 7 Man. & Gr. 882*

So, where goods are shipped on account, and at the risk, of the consignee, the bill of lading transfers to him the legal right to the goods, subject only to the equitable right of the consignor, to stop them *in transitu*, if they are not paid for, and the consignee becomes insolvent. If goods be once actually delivered to a servant or correspondent of the vendee, authorized by him to receive them, the right of the vendor to stop them in the event of the insolvency of the vendee, is gone, *Bolin v. Huffnagle* 1 Raw. R. 9.

Where the vendor shipped the goods on board of a packet vessel, the master of which refused to deliver them, on his arrival, to the vendee, until he was paid a balance due to him for antecedent freights; and the vendee declining to pay it, the goods were brought back by the master; it was held, that the vendor had still the right to

stop the goods, the *transitus* not being determined, *Allen v. Mercier*, 1 Ash. R. 103. The *transitus* of the goods, and the right of stoppage in *transitu*, is determined by delivery to the vendee, either actual or constructive, or by circumstances which are equivalent to such delivery, *Donath v. Broomhead*, 7 Barr's R., 301. Where goods sold, to be paid for on delivery, were put on board a vessel appointed by the vendee, not to be transported to him, or delivered for his use at a place of his appointment, but to be shipped by such vessel, in his name, from his place of residence and business to a third person, it was held, there was no right of stoppage in *transitu* after the goods were embarked, *Rowley v. Bigelow*, 12 Pick. R. 307; and see, also, *Stubbs v. Lund*, 7 Mass. R. 453; *Hollingsworth v. Napier*, 3 Caines' R. 182.

come to the actual possession of the vendee, the vendor's right to stop them in transitu may still be exercised in the event of the bankruptcy or insolvency of the vendee (*m*), unless indeed such right be defeated, as we have said, by a *bonâ fide* indorsement of the bill of lading. Thus, although by the sale of the goods the property in them, involving the risk of their loss, passes to the purchaser, and although the possession of them be delivered to a carrier named by him, still such possession may be resumed by the vendor during the journey, in the event of the bankruptcy or insolvency of the vendee. As this right is a departure from legal principles on the vendor's behalf, it is allowed only in one of the two cases of bankruptcy or insolvency, by which latter term appears to be here meant a general inability to pay, evidenced by stoppage of payment (*n*). When possession of goods has been resumed by the vendor under his right of stoppage in transitu, he is restored to the lien for the unpaid purchase-money which he had before he parted with such possession; but, according to the better opinion, the contract for sale is not thereby rescinded (*o*).

(*m*) *Holst v. Pownal*, 1 Esp. 240; *Northey v. Field*, 2 Esp. 613; *Jackson v. Nichol*, 5 New Cases, 508, 519.*

(*n*) See *Smith's Merc. Law*, 501, note. The case of *Wilmshurst v. Bowker*, 5 New Cas. 541,* 7 Scott, 561, 2 Man. & G. 812,* was reversed in error, 7 Man. & Gr. 882.*

(*o*) *Bloxam v. Sanders*, 4 Barn. & Cress. 949;* 1 *Smith's Leading Cases*, 432. But see *Van Casteel v. Booker*, 2 Ex. Rep. 691;* (1)

(1) See also *Wilmshurst v. Bowker*, 5 Bing. N. C. 541, (35 Eng. Com. Law Rep. 218.) It appears never to have been expressly decided in England, whether the effect of stoppage in transitu, is entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, *Clay v. Harrison*, 10 B. & C. 106; *Wentworth v. Outhwaite*, 10 M. & W. 452. In *Bloxam v. Sanders*, 10 Eng. Com. Law Rep. 477, the defendants refused to deliver hops, on account of the bankruptcy of the vendee, and afterwards resold them—the Court held that the plaintiffs could not maintain trover, without payment or tender of the price—but that if the vendor resold the hops wrongfully, they might bring a special action for the injury sustained by such wrongful sale, and recover damages to the extent of that injury, and the same reasoning was held in *Wilmshurst v. Bowker*, which was also an action of trover, in which a similar decision was given. The following American authorities support the doctrine taken in the text, and decides that this right of stoppage *in transitu*, does not proceed on the ground of rescinding the contract, but on the ground of an equitable lien; the contract remains in force, at least to such an extent that the vendee may still have the goods by paying the price of them, *Jordan v. James*, 5 Ham. R. 88; *Rowley v. Bigelow*, 12 Pick. R. 307; *Newhall v. Vargas*, 3 Shep. R. 314.

[*43] * There is one case in which the property in goods passes from one person to another by payment of their value without any actual sale. In an action of trover (*p*) the plaintiff is entitled to damages equal to the value of the property he has lost, but not further, unless he has sustained any special damage (*q*). The defendant therefore, having paid the amount of the damages, is entitled to retain the goods in respect of which the action is brought; and the property in them vests in him accordingly (*r*) (1).

The alienation of personal chattels is prohibited to be made by certain persons and for certain objects. And first with respect to persons. An *alien* or foreigner is under great restrictions as to the acquirement of real estate (*s*); but with respect to personal chattels he stands on the same footing as a natural-born subject; for by the recent act to amend the laws relating to aliens (*t*), it is enacted (*u*) that from and after the passing of the act, any alien, being the subject of a friendly state, shall and may take and hold by purchase, gift, bequest, representation or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges and capacities, as if he were a natural-born subject of the united kingdom. The gift of an *infant* or person under the age of twenty-one years is voidable (*v*), and that of an *idiot* or *lunatic* appears to be absolutely void (*x*): in [*44] this respect the law of personal *chattels is now the same as that of real estate (*y*). Married women also are incapable of making any disposition of personal chattels, except such as may be settled in equity in trust for their own *separate use*; for marriage is an

(*p*) See ante, p. 23.

(*q*) *Bodley v. Reynolds*, 8 Q. B. 779.*

(*r*) *Cooper v. Shepherd*, 3 C. B. 266, 272.*

(*s*) See Principles of the Law of Real Property, 56, 2nd ed.; 58, 3rd ed.

(*t*) Stat. 7 & 8 Vict. c. 66, explained by stat. 10 & 11 Vict. c. 83.

(*u*) Sect. 4.

(*v*) Bac. Abr. tit. Infancy and Age (I), 3.

(*x*) Ibid. tit. Idiots and Lunatics (F).

(*y*) See Principles of the Law of Real Property, 57, 2nd ed.; 59, 3rd ed.

(1) The action of replevin, will also Replevin, p. 37, &c., where the cases are determine the title to personal chattels, collected.
for it may be brought wherever one claims For the Statutes of Pennsylvania on the personal property in the possession of subject of Replevin, see Morris on the another. See Morris on the Law of Law of Replevin, Appx. iii., p. 281, &c.

absolute gift in law of all the wife's choses in possession to her husband, as well those she is possessed of at the time of the marriage, as those which come to her during her coverture (*z*) (1). Persons convicted of treason or felony forfeit on such conviction the whole of their goods and chattels to the crown; and nothing but a *bonâ fide* alienation for a valuable consideration, made previously to conviction, can avert such forfeiture (*a*). When a felony is not capital, the punishment endured has the effect of a pardon (*b*); but the restoration to civil rights does not take effect till the determination of the period of punishment. All personal property, therefore, which accrues to a felon during his transportation is forfeited to the crown (*c*); but a mere contingent interest will not be forfeited, if it do not vest until the expiration of the period of banishment (*d*).

With regard to the objects for which the alienation of chattels personal is prohibited, gifts to charitable purposes are not restricted, neither are corporations excepted objects, as in the case of landed property (*e*). But by a statute of the reign of Elizabeth (*f*), the gift

(*z*) Co. Litt. 300 a; 1 Rep. Husb. and Wife, 169. See post, the chapter on Husband and Wife.

(*a*) 3 Rep. 82 b; 4 Bla. Com. 387, 388; Perkins v. Bradley, 1 Hare, 219.

(*b*) Stat. 9 Geo. IV. c. 32, s. 3.

(*c*) Roberts v. Walker, 1 Russ. & M. 752.

(*d*) Stokes v. Holden, 1 Keen, 145.

(*e*) See Principles of the Law of Real Property, 58, 2nd ed.; 60, 61, 3rd ed.

(*f*) Stat. 13 Eliz. c. 5. See stat. 6 Geo. IV. c. 16, s. 73, repealed and re-enacted by stat. 12 & 13 Vict. c. 106, s. 126; also 1 & 2 Vict. c. 110. s. 59; 7 & 8 Vict. c. 96, s. 19.

(1) By an Act of the Legislature of Pennsylvania, passed April 11, 1848, all property, whether real or personal, owned by or belonging to any married woman, shall be owned, used and enjoyed by her as her own separate property, freed from any liability for the debts of her husband; Purd. Dig. by Stroud & Brightly, (1853,) p. 570.

The Statutes of the State of New York, contain a similar provision, 3 Revis. Stat. of N. Y. 667.

In Arkansas, a married woman possessed of slaves, shall be entitled to retain said slaves and their increase, notwithstanding her coverture, as her separate property exempt from any liability for the debts or

contracts of her husband. Act Dec. 8, 1846, Ch. 104, §§ 2, 3.

In California, the property of the wife, acquired before the marriage, and all such as shall be acquired by her after coverture by gift, bequest, devise or descent, may become her separate property by a full and complete inventory thereof being made and acknowledged and proved in the manner required by law for a conveyance of land; but property acquired in any other manner than above specified, during coverture, by the wife, shall be the common property of husband and wife. But in all cases the husband shall have the management of his wife's estate, during the coverture, unless he shall be guilty of wasting or squandering it; Act of 17 April, 1850.

[*45] or alienation *of any lands, tenements, hereditaments, *goods and chattels*, made for the purpose of delaying, hindering, or defrauding creditors, is rendered void as against them, unless made upon *good*, which here means *valuable*, consideration and *bonâ fide* to any person not having at the time of such gift any notice of such fraud. The fraudulent purpose intended by this statute can of course only be judged of by circumstances. Thus it has been held that if the owner of goods make an absolute assignment of them by deed to one of his creditors, and yet remain in the possession of the goods, such remaining in possession is a badge of fraud, which renders the assignment void, by virtue of the statute, as against the other creditors (*g*). But if the assignment be made to secure the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods until he shall make default in payment, the possession of the debtor, being then consistent with the terms of the deed, is not regarded in modern times as rendering the transaction fraudulent within the meaning of the statute (*h*). Such a transaction is in fact a *mortgage* of the goods, analogous to a mortgage of lands (*i*) (1). The property

(*g*) *Twyne's case*, 3 Rep. 80 b; 1 *Smith's Leading Cases*, 1; *Edwards v. Harben*, 2 T. Rep. 587.

(*h*) *Edwards v. Harben*, 2 T. Rep. 587; *Martindale v. Booth*, 3 Barn. & Adol. 498; **Reed v. Wilmot*, 7 Bing. 577.*

(*i*) See *Principles of the Law of Real Property*, 332, 2nd ed.

(1) It is a generally established rule, that, as regards third persons, there cannot be a sale or mortgage of personal property, without a transfer of the possession; *Water's exec's v. McClellan et al.*, 4 Dal. R. 208, note (*a*). But this rule is subject to many exceptions; thus, in several of the States there may be a mortgage of personalty, without a notorious and visible change of possession; *Whitney v. Lowell*, 33 Maine R. 318; *Thayer v. Stark*, 6 Cush. R. 11; *Whitney v. Heywood*, Id. 82; *Skiff v. Solace*, 23 Vt. R. 279; *Prior v. White*, 12 Ill. R. 261; *Rugg v. Barnes*, 2 Cush. R. 591; *Ballume v. Wallace*, 2 Rich. R. 80; *Smith v. Turcher*, 9 Ala. R. 208; *Smith v. Acker*, 23 Wend. R. 653; *Cole v. White*, 26 Id. 511; the mortgage, must, however, be recorded, in order to render it valid as regards third parties; *Witham v. Butter-* field, 6 Cush. R. 217; *Brigham v. Weaver*, Id. 298; *Stowell v. Goodale*, Id. 452; *Bishop v. Cook*, 13 Barb. S. R. 326; *Frost v. Willard*, 9 Barb. S. R. 440; *Wilson v. Leslie*, 20 O. R. 161; *Brown v. Webb*, Id. 389; *Cook v. Thayer*, 11 Ill. 617; *Travis v. Bishop*, 13 Metc. R. 304; *Shapleigh v. Wentworth*, Id. 358; *Vaughn v. Bell*, 9 B. Mon. R. 447; *Burditt v. Hunt*, 25 Maine R. 419; *Appleton v. Bancroft*, 10 Metc. R. 231; *Camp v. Camp*, 2 Hill's R. 628; but, as between the parties themselves, it has been held, that the mortgage would be good without being recorded, or without a transfer of the possession; *Smith v. Moore*, 11 N. H. R. 55; *Winsor v. McLellan*, 2 Story's R. 492; *Hall v. Snowhill*, 2 Green's R. 8.

But a mortgage of chattels executed in the State of New York, and valid by the

in the goods passes at law by the deed to the mortgagee (*k*), whilst the possession of them rightly remain with the mortgagor. The mortgagee therefore cannot maintain an action of trover for the goods against a stranger, until default has been made by the mortgagor in payment of the money secured (*l*). In this respect a mortgage of *goods [*46] differs from a mere pledge, in which the property in the goods remains with the pledgor, and the pledgee obtains possession only, the right to retain which constitutes his lien for the money he has advanced (*m*), and enables him to maintain an action of trover (*n*). The chief disadvantage in a mortgage of goods is, that, as the goods

(*k*) *Gale v. Burnell*, 7 Q. B. 850.*

(*l*) *Bradley v. Copley*, 1 C. B. 685.* If the mortgagor should retain possession *after* default in payment at the time specified, it may be doubted whether the security would not then be void as against creditors under the statute of Elizabeth, for by the terms of the deed, the mortgagor is only to enjoy possession *until* default.

(*m*) *Ante*, p. 27.

(*n*) *Legg v. Evans*, 6 Mee. & Wels. 36.*

laws of that State without a change of possession, will not protect the property from attachment in the State of Massachusetts by creditors of the mortgagor, if found there in the possession of the mortgagor, though brought there by him for a temporary purpose; *Wentworth v. Leonard*, 4 Cush. R. 414.

To some extent the mortgage of personal property seems subject to the rules governing the mortgage of real estate; thus, it may be sold on execution against the mortgagor, and the purchaser will take it subject to the mortgage; *Bank of Lansingburgh v. Crary*, 1 Barb. S. R. 542. Again, a mortgage of personalty is good, and will have effect against any other title inferior to it, except a sale or mortgage of the same goods from the same person previously recorded; *Youngblood v. Keadle*, 1 Strobl. R. 121.

In Florida, there must be a delivery within twenty days, in order to render the mortgage valid; *Sanders v. Pepoon*, 4 Fla. R. 465.

In Pennsylvania, the old rule seems generally to prevail, but in the case of a lease, the lessee may mortgage improvements made upon the property during the

term, to his lessor, without delivery thereof, and such a mortgage will be good, for, to quote the words of Judge Kennedy, "In order to render a mortgage or sale of personal property valid, as against the creditors of the mortgagor or vendor, it is true, in general, that a corresponding change of possession thereof must accompany the same. But if such change of possession be impracticable, it must be dispensed with, for the law never requires that which is impossible." And, by an Act of the Legislature of that State, passed April 5, 1853, Pamp. L. 295, it is provided, that the lessees of Coal Mines in Schuylkill County, "may mortgage their interests in such rights or property demised, together with all machinery and fixtures appurtenant or belonging thereto."

See also on the subject of mortgage of chattels; *Beaumont v. Yeatman*, 8 Hump. R. 542; *Provost v. Wilcox*, 17 O. R. 359; *Jewett v. Preston*, 27 Maine R. 400; *Ferguson v. Thomas*, 26 Id. 499; *Hubby v. Hubby*, 5 Cush. R. 515.

As to the necessity of a transfer of possession in the case of a levy and execution upon personal property; see *Levy v. Wallis*, 4 Dal. R. 167, note (*a*).

continue in the possession of the mortgagor as reputed owner, they will, by virtue of provisions in the bankrupt act, become liable, in the event of his bankruptcy, to be sold for the benefit of his creditors generally (*o*). And the mortgagee will not be allowed to avail himself of his bill of sale, in the event of the subsequent insolvency of his debtor (*p*).

Choses in possession have long been liable to involuntary alienation for the payment of the debts of their owner. On the decease of any person, his personal property generally has always been liable, in the first place, to the payment of his debts of every kind. And if a creditor take proceedings against his debtor in the debtor's lifetime, a sale of his goods and chattels may be procured by means of a writ of *feri facias* (*fi. fa.*) issued in *execution* of the *judgment* of the court. This writ is of very ancient date, and is usually said to be given by the common law; though some suppose that its name arose from the wording of the statute of Edward I. (*q*), by which *the writ of *elegit* [*47] was provided (*r*). The writ directs the sheriff to cause the debt to be realized out of the goods and chattels of the debtor, *quod fieri facias de bonis et catallis*, &c.; and a sale of the goods is made by the sheriff accordingly. Goods however are not, like lands, affected by the mere entry of a *judgment* of a court of law against their owner. The debtor was always allowed to alienate his goods until the writ of execution was issued; although, by a fiction of law, all judicial proceedings, writs of execution included, formerly related back to the first day of the term to which they belonged (*s*). Goods, therefore, which had been sold after the first day of a term, might yet practically have been seized under a writ of *fi. fa.* relating back to that day, but subsequently issued. To remedy this evil, it was enacted by one of the sections of the Statute of Frauds (*t*), that no writ of *feri facias* or other writ of

(*o*) Ryall v. Rolle, 1 Atk. 165, 170; S. C. nom. Ryall v. Rowles, 1 Ves. sen. 348; stat. 6 Geo. IV. c. 16, s. 72, repealed and re-enacted by stat. 12 & 13 Vict. c. 106, s. 125. See post, p. 48.

(*p*) Stat. 1 & 2 Vict. c. 110, ss. 57, 61. See Hunt v. Robins, 3 Q. B. 300; Hardy v. Tingey, 5 Ex. Rep. 294.* See also stat. 7 & 8 Vict. c. 96, ss. 17, 21, the latter of which is differently worded from the corresponding section of the other act.

(*q*) Stat. 13 Edw. I. c. 18, called the Statute of Westminster the Second. See Principles of the Law of Real Property. 63, 2nd ed.; 66, 3rd ed.

(*r*) Bac. Abr. tit. Execution (C).

(*s*) Com. Dig. tit. Execution (D. 2); Anon 2 Ventr. 218. See 2 Sugd. Vend. & Pur. 9th ed. 198.

(*t*) Stat. 29 Car. II. c. 3, s. 16.

execution shall bind the property of the goods against which it is sued, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and the officer is required, upon receipt of the writ, to indorse on it (without fee) the day of the month and year on which he received it. Goods and chattels may therefore be safely alienated, although judgment may exist against the owner, provided a writ of execution be not actually in the hands of the sheriff. And an alienation to secure or satisfy another creditor is not void within the above-mentioned statute of the 13 Elizabeth (*u*), although made with the intention of defeating an expected execution of the judgment creditor (*x*). Besides the sale of goods under the writ of *fieri facias*, there might also be a writ of *levari facias*, *now [*48] disused, by which the sheriff levied the corn and other present profit which grew on the lands, together with the rents then due, and the cattle thereon (*y*). And by the writ of *elegit*, the goods of the debtor are delivered to his creditor at an appraised value, together with possession of his lands (*z*). It has however been recently enacted, that the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade (not exceeding in the whole the value of five pounds), shall not be liable to seizure under any execution or order of any court against his goods and chattels (*a*) (1).

(*u*) Stat. 13 Eliz. c. 5.

(*x*) Wood v. Dixie, 7 Q. B. 892.*

(*y*) 2 Wms. Saunders, 68 a, n. (1).

(*z*) Pullen v. Purbecke, 1 Ld. Raym. 346. See the present forms of this writ and of the writ of *fi. fa.*, 9 Adol. & Ell. 986* *et seq.*, 5 New Cases, 366 *et seq.*

(*a*) Stat. 8 & 9 Vict. c. 127, s. 8.

(1) Provisions analogous to that stated in the text, and more or less liberal to the debtor, are in force in almost all the States of the Union. N. H. Compiled Stats. (1853), p. 469, sec. 2; Thompson's Dig. Ls. of Fla., p. 356, sec. 3; 2 Revis. Stats. of N. Y., 3d ed., p. 464, sec. 23; Revis. Stats. of Vt. (1839), p. 240, sec. 13; Michi. Revis. Stats., Part 3d, Title II., Chap. 7, p. 454, sec. 24; Clay's Ala. Dig. (1843), p. 210, sec. 47; Revis. Stats. of Mass. (1836), p. 589, sec. 22; Elmer's Dig. Ls. of N. J., p. 417, sec. 37; Revis. Stats. of N. C. (1836-7), p. 266, sec. 7; Loughborough's Dig. (Ky.), pp. 235, 236; Vol. 6, Stats. of S. C., pp. 213, 214; Caruth. and Nichol. Stat. Ls. of Tenn., p. 533, and Ls. of Tenn. Suppl. (1846), pp. 230, 231; Ls. of Del., Revis. Code, 1852, pp. 393, 394; Dig. of the Stats. of Ark., pp. 496, 497; Stats. of O. (1841), p. 487; How. & Hutch. Stat. Ls. of Mis., p. 634, sec. 18. In Pennsylvania, the exemption law is somewhat peculiar, it being enacted by the Act of the 9th of April, 1849, sec. 1, that, "In lieu of the property now exempt by law from levy and sale on execution, issued upon any judgment obtained upon contract, and distress for rent, property to the value of three hundred dollars, exclusive of all

Choses in possession are also liable to involuntary alienation on the bankruptcy of their owner. In this event all the personal estate of the bankrupt, wheresoever the same may be found or known, vests at once in the assignees under the bankruptcy by virtue of their appointment (b). And in order to prevent traders from obtaining false credit from the possession of property which is not their own, it is provided (c) that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his *possession, order, or disposition*, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court of Bankruptcy shall have power to *order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. Similar provisions have also been made in favor of the assignees of persons taking the benefit of either of the acts for the relief of insolvent debtors (d). But it has been held, in case of bankruptcy, that until an order for the sale of such goods has been made by the court, no property in them is vested in the assignees (e).

(b) Stat. 6 Geo. IV. c. 16, s. 63; 1 & 2 Will. IV. c. 56, s. 25, repealed and consolidated by stat. 12 & 13 Vict. c. 106, s. 141. See post, the chapter on Bankruptcy.

(c) Stats. 6 Geo. IV. c. 16, s. 72; 1 & 2 Will. IV. c. 56, s. 7; 5 & 6 Vict. c. 122, s. 59 *et seq.*, repealed and consolidated by stat. 12 & 13 Vict. c. 106, s. 125.

(d) Stat. 1 & 2 Vict. c. 110, s. 57; 7 & 8 Vict. c. 96, s. 17. See post, the chapter on Insolvency.

(e) *Heslop v. Baker*, 15 Jur. (Exch.), 684.

wearing apparel of the defendant and his family, and all bibles and school books in use in the family, (which shall remain exempted as heretofore,) and no more, owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent." *Purd. Dig.* (1853), p. 331, sec. 20.

*CHAPTER IV.

[~~50~~]

OF SHIPS.

THERE is one important class of choses in possession which the policy of the law has rendered subject to peculiar rules, namely ships and vessels. In order to encourage British shipping, certain privileges with respect to the importation and exportation of goods have been conferred exclusively on British vessels (*a*); but no ship can, with some slight exceptions, be admitted to be a British ship unless duly registered and navigated as such (*b*). The rules respecting the navigation of British vessels do not fall within the scope of our present treatise; but their registration is important as affecting the property which may be held in them. By a recent act of parliament "for the registering of British vessels (*c*)," the laws on this subject were consolidated, and the provisions of former acts re-enacted. But some of these provisions have since been altered by the more recent act "to amend the laws in force for the encouragement of British shipping and navigation (*d*)."
No ship can enjoy the privilege of a British vessel unless it be registered by the collector and comptroller of customs in the port of the united kingdom to which it belongs, or by other officers in the colonies and possessions abroad (*e*). Prior *to registration, a declara- [~~51~~]
tion must be made by the owner of the vessel, or by a pre-
scribed number of the owners if more than one, in a form provided by the act (*f*), stating when and where the ship was built, and the names, occupations and residences of the owners, and that they are British subjects, denizens, or naturalized, and that no foreigner, directly or indirectly, has any share or part interest in the ship. A certificate of registry is then given in a prescribed form (*g*), and a bond is taken from the master, and such of the owners as attend to make the above decla-

(*a*) Stat. 12 & 13 Vict. c. 29, repealing stat. 8 & 9 Vict. c. 88. The former statutes were 3 & 4 Will. IV. c. 54, and 6 Geo. IV. c. 109, besides earlier statutes.

(*b*) Stat. 12 & 13 Vict. c. 29, ss. 7, 20.

(*c*) Stat. 8 & 9 Vict. c. 89. The former statutes were 3 & 4 Will. IV. c. 55; 6 Geo. IV. c. 110, and 4 Geo. IV. c. 41, besides earlier statutes.

(*d*) Stat. 12 & 13 Vict. c. 29.

(*e*) Stat. 8 & 9 Vict. c. 89, ss. 2, 3, 10, 11; 12 & 13 Vict. c. 29, ss. 1, 18.

(*f*) Stat. 12 & 13 Vict. c. 29, s. 19.

(*g*) Sec. 18.

ration, to the effect that the certificate shall be solely made use of for the service of the ship or vessel for which it is granted, and shall be delivered up in certain cases (*h*). The certificate accordingly always accompanies the ship. This certificate may be renewed, and the vessel registered *de novo*, if the certificate should be lost or mislaid (*i*), or on the conviction or absconding of any person who may have illegally detained it (*k*), or on any change of property in the ship (*l*). And if the owner or owners who shall have made the above declaration shall have transferred all their shares in the ship, or if the ship after registration should in any manner be altered, so as not to correspond with all the particulars contained in the certificate of her registry, then a new registration is imperative (*m*). But the name by which a vessel has been once registered can never afterwards be changed (*n*) (1).

The property in every British vessel, of which there are more than one owner, is considered to be divided into 64 equal shares; and the proportion held by each owner is described in the registry as being a [*52] certain *number of 64th shares. But the right to such small fractional shares as may exceed the number of 64th shares into which the property in any ship can be reduced, is not affected by reason of the same not having been registered. And partners in trade may hold any ship, or any share in a ship, in the name of the copartnership, without distinguishing the proportionate interest of each of the owners (*o*); the names of all the partners must however appear on the registry in addition to the name of the firm (*p*) (2). No greater number than thirty-two persons can be legal owners of any ship at the same time; but this provision is not to affect the equitable title of minors, legatees, creditors or others exceeding that number, duly represented by or holding from any of the persons, within that number, registered as legal owners of any share; and three or more of the trustees of any joint stock company may, by permission of the com-

(*h*) Stat. 8 & 9 Vict. c. 89, s. 23.

(*i*) Sect. 29.

(*l*) Sect. 42.

(*n*) Sect. 27.

(*k*) Sect. 30.

(*m*) Sects. 11, 31.

(*o*) Sect. 35.

(*p*) Slater v. Willis, 1 Beav. 354, 361.

(1) The law is the same in the United States, unless the name is changed by a special act of congress.

(2) There are no provisions in the registry laws of the United States, restricting the number of owners, or regulating the fractional parts of their ownership.

missioners of customs, obtain the registration of any ship or vessel belonging to the company, stating the name and description of the company instead of the names and descriptions of the shareowners (*q*). Subject, however, to these provisions, the registry of a person's name as owner is conclusive as to his title both at law and in equity; for the object of the act is to make a public accessible registry of the true ownership of all British vessels (*r*). If, therefore, three persons should register their ship in the names of two of them only, the third would be without any remedy for his share (*s*).

Part owners of a ship are tenants in common, but jointly interested in her use and employment, and subject *to certain rules [*53] enforced by the Court of Admiralty for the disposition of the ship in case of dispute (*t*). Each part owner is at full liberty to dispose of his share without the assent of the others; and the mere circumstance of owning a share in a ship will not make the owner personally liable for repairs or other outgoings in respect of the ship (*u*). But a part owner will be personally liable for all debts on behalf of the ship incurred with his actual or implied consent. If, therefore, all the owners have agreed in appointing one of their number to be manager (or *ship's husband*, as he is termed (*x*), or if the ship be placed under the management of the master, and the owners divide the profits (*y*), the ship's husband in the one case (1), or the master in the other, is thereby rendered the agent of each part owner: each part owner will accordingly be in these cases personally liable for the full amount of

(*q*) Stat. 8 & 9 Vict. c. 89, s. 36.

(*r*) *Mestaer v. Gillespie*, 11 Ves. 621, 625. See *Davenport v. Whitmore*, 2 My. & Cr. 177; *Follett v. Delany*, 2 De Gex & Smale, 235.

(*s*) *Battersby v. Smyth*, 3 Mad. 110; *Slater v. Willis*, 1 Beav. 354.

(*t*) See *Abbot on Shipping*, pt. i. c. 3; *Davis v. Johnston*, 4 Sim. 539; *Green v. Briggs*, 6 Hare, 395.

(*u*) *Briggs v. Wilkinson*, 7 Barn. & Cress. 30.*

(*x*) *Helme v. Smith*, 7 Bing. 709; S. C. 5 Moo. & Pay. 744; *Robinson v. Gleadow*, 2 N. C. 156; * S. C. 2 Scott, 250.

(*y*) *Ex parte Bland*, 2 Rose, 91; *Briggs v. Wilkinson*, 7 Barn. & Cress. 30, 35.*

(1) A ship's husband, is a common expressive maritime phrase, to denote a peculiar sort of agency, created and delegated by the owner in regard to the repairs, equipment, management, and other concerns of the ship. He is understood to be the general agent of the owners, in regard to all the affairs of the ship in her home port. Story, *Agency*, § 35, and notes; 3 Kent, (5th ed.) 157.

The ship's husband, or managing owner, may bind the other owners for the outfit, care, and employment of the vessel, but he has no power to purchase a cargo on their

all debts which may be incurred for repairs and other necessary expenses. But the ship's husband has no right to insure the ship on behalf of the other owners without authority for that purpose either express or implied (z).

Whenever the property in any British ship or any part thereof shall, after registry, be sold to any other of her majesty's subjects, the same must be transferred by bill of sale or other instrument in writing (but which need not be a deed (a)), containing a recital of the certificate

(z) *Robinson v. Gleadow*, ubi supra.

(a) *Hunter v. Parker*, 7 Mee. & Wels. 322, 348.*

credit, without authority from them; *Hewitt v. Buck*, 17 Maine, 147; *Bell v. Humphries*, 2 Stark. 286.

It is not his duty as ship's husband to insure a vessel, and neither he nor part owners, who insure the interest of their co-owners in a vessel without express authority, can recover the premium paid by them; *Turner v. Burrows*, 8 Wendell, 144; (*Abbott on Shipping*, p. 186, n. p.)

Sims v. Brittain, 4 Barn. & Adol. 375; *Law Magazine* article, "Mercantile Law," No. 13. See *Kent's Commentaries*, Edin. Ed. 147. See also *Story's Commentaries on Agency*, p. 32. "The ship's husband," says *Beawes*, (*Lex Mercatoria*, p. 52,) "is, as it were, a steward at land, to the owner of the ship, as the officer bearing that name is, on board, when the ship is at sea." "The ship's husband," says *Mr. Bell*, (*Principles of the Law of Scotland*, p. 449,) "is the agent or commissioner for the owners. He may be a part owner or a stranger. His powers are by mandate or written commission by the owners, or by verbal appointment; the latter chiefly, where he is also part owner. His duties are,—1. To arrange everything for the outfit and repair of the ship, stores, repairs, furnishings; to enter into contracts of affreightment; to superintend the papers of the ship. 2. His powers do not extend to the borrowing of money; but he may grant bills for furnishings, stores, repairs, and the necessary engagements, which will

bind the owners, although he may have received money wherewith to pay them.

3. He may receive the freight, but is not entitled to take bills instead of it, giving up the lien by which it is secured. 4. He has no power to insure for the owner's interest, without special authority. 5. He cannot give authority to a law agent that will bind his owners for expenses of a law suit. 6. He cannot delegate his authority." See also 1 *Bell's Commentaries*, p. 411; (*Abbott on Shipping*, p. 186, n. p.)

Where a person supplied stores to a ship on the order of one of several owners, who acted as the ship's husband, and took his note in payment, and gave a receipt in full, it was held, that all the owners were liable, the note not being paid; *Schemerhorn v. Loines*, 7 Johns. R. 311.

The managing owner of a vessel represents the interests of all, and has the same power which the major part in interest have, with respect to the change of employment, and the preparation and outfit of the vessel, in a manner suited to her profitable employment, in the business to which she is destined; *Hall v. Thing*, 10 Shep. 461.

The ship's husband or managing owner may bind the other owners for the outfit, care and employment of the vessel, but he has no power to purchase a cargo on their credit, without authority from them; *Hewitt v. Buck*, 5 Shep. R. 147.

of registry, or the principal contents thereof, otherwise such [*54]
 *transfer shall not be valid or effectual for any purpose what-
 ever either in law or in equity (1). But no bill of sale is to be deemed

(1) "Our Registry Act requires, that upon every transfer of a registered ship in whole or in part, to any other citizen, there shall be some instrument of writing in the nature of a bill of sale, which shall recite at length the certificate of registry, otherwise, the ship shall be incapable of being registered anew. Act of 1792, ch. 45, § 14. But the act does not invalidate any contract of conveyance made between the parties, unless the certificate is recited, but leaves such contract to be decided upon, according to the general principles of the common law; *Wendover v. Hoogboom*, 7 John. R. 308; *Hatch v. Smith*, 5 Mass. R. 42; *Weston v. Penniman*, 1 Mason R. 306. But our act requires every ship to be registered anew upon every transfer; and further declares, that in case she is not so registered anew, she shall not be entitled to the privileges and benefits of a ship of the United States. Act of 1792, ch. 45, § 14. The consequence of the non-registry is, that the ship becomes a foreign ship." *Abbott on Shipping*, by Story, p. 96, n. 2.

A recent act of congress has provided for the recording of any mortgage or conveyance of a vessel. It is entitled "An Act to provide for recording the conveyances of vessels and for other purposes," passed the 29th July, 1850. The incidental effects of this act upon mortgages and conveyances of vessels will be found to be very extensive.

SEC. 1. "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation or conveyance, be recorded in the office of the collector of the customs where such vessel is registered or enrolled. *Provided*, That the lien by bottomry on any vessel created during her

voyage by a loan of money or materials. necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act.

SEC. 2. "*And be it further enacted*, That the collectors of the customs shall record all such bills of sale, mortgages, hypothecations or conveyances, and also, all certificates for discharging and cancelling any such conveyance, in a book or books to be kept for that purpose, in the order of their reception; noting in said book or books, and also on the bill of sale, mortgage, hypothecation or conveyance, the time when the same was received, and shall certify on the bill of sale, mortgage, hypothecation or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance, or certificate of discharge, fifty cents.

SEC. 3. "*And be it further enacted*, That the collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee, and shall permit said index and books of record to be inspected during office hours, under such reasonable regulations as they may establish, and shall, when required, furnish to any person, a certificate, setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, (if inserted in the register or enrolment,) and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel, recorded since the issuing of the last register or enrolment, viz., the data, amount of such incumbrance, and from, and to whom, or in whose favor made, the collector shall receive for each such certificate one dollar."

void by reason of any error in the recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby (*b*); and owners of fractional parts of ships above the number of integral 64th parts into which the property in the ship can be reduced by division, may transfer the same one to another, or jointly to any new owner, by memorandum upon their respective bills of sale, or by fresh bill of sale (*c*). And every bill of sale and other assignment of any ship or vessel, or any interest, share or property therein, either absolutely or by way of mortgage, is exempt from stamp duty (*d*). But no bill of sale or other instrument in writing shall be effectual to pass the property in any ship or vessel, or any share thereof, or for any other purpose (*e*), until registry is made of the following particulars: namely, the name, residence and description of the vendor or mortgagor, or of each vendor or mortgagor if more than one; the number of shares transferred; the name, residence and description of the purchaser or mortgagee, or of each purchaser or mortgagee if more than one; and the date of the bill of sale or other instrument, and of the production of it for registration. And if the vessel is not about to be registered *de novo*, the collector and comptroller of the port where the ship is registered are required to indorse the above particulars of such bill of sale or other instrument on the certificate of the ship's registry, when the same shall be produced to them for that purpose (*f*). Every bill of sale of a ship should [55] therefore be registered *immediately, and an indorsement of the sale should, as soon as practicable, be made on the certificate of registry; for the provisions of the Registry Act are such, that if the certificate of the ship's registry be not endorsed as above mentioned within thirty days from the registry of the sale or mortgage, if the ship be in the port to which she belongs, or within thirty days from her arrival in port, if she be at sea, a subsequent purchaser or mortgagee, by obtaining a prior endorsement of his bill of sale on the certificate of the ship's registry, may obtain priority over the former purchaser or mortgagee (*g*). The collector and comptroller of customs

(*b*) Stat. 8 & 9 Vict. c. 89, s. 34.

(*c*) Sect. 35.

(*d*) Stat. 6 Geo. IV. c. 41, s. 1; 8 & 9 Vict. c. 89, s. 35.

(*e*) See *Boyson v. Gibson*, 4 C. B. 121.*

(*f*) Stat. 8 & 9 Vict. c. 89, s. 37.

(*g*) Sects. 38, 39. See *Ex parte Jones*, 2 Cro. & Jerv. 513; * S. C. 2 Tyrw. 671.

of any port where a ship may happen to be, have also power to endorse, according to the act, the certificate of the ship's registry with any bill of sale, having first given notice to the collector and comptroller of the port to which the ship belongs, who are to send information of any other bill of sale previously registered (*h*).

When a transfer of any British ship, or of any share therein, is made only as a security for the payment of a debt or debts, either by way of mortgage, or by assignment to a trustee or trustees for sale, it is to be so stated in the registry of the transfer, and also in the endorsement of the transfer on the certificate of the ship's registry; and the transferee is not, by reason of such transfer, to be deemed to be the owner of the ship or share transferred; nor is the transferrer to be deemed to have ceased to be owner, any more than if no such transfer had been made; except so far as may be necessary for the purpose of rendering the ship or share transferred available, by sale or otherwise, for the payment of the debt or debts, for securing the payment of which such transfer shall have been made (*i*) (1). But, notwithstanding the mortgagor still *continues to be owner, the right of the mortgagee, if his security be duly registered, will not be [*56] affected by the bankruptcy (*k*) or insolvency (*l*) of the mortgagor. A British ship, therefore, forms an exception to the rule, that the whole legal estate or interest in all property mortgaged vests in the mortgagee. The mortgagor still retains a legal interest, which he may assign, subject to the mortgage (*m*); but should the mortgagee take

(*h*) Sect. 40.

(*i*) Sect 45. *Irving v. Richardson*, 2 Barn. & Adol. 196*

(*k*) Stat. 8 & 9 Vict. c. 89, s. 46. Stat. 12 & 13 Vict. c. 106, s. 125. The last act, 12 & 13 Vict. c. 29, is not, however, referred to.

(*l*) Stat. 1 & 2 Vict. c. 110, s. 57; 7 & 8 Vict. c. 96, s. 17. These acts refer to the former act for registering British vessels, 3 & 4 Will. IV. c. 55. This act was not, repealed by the stat. 8 & 9 Vict. c. 89, its provisions being merely re-enacted verbatim with certain additions; but the last act, 12 & 13 Vict. c. 29. has altered the form of certificate.

(*m*) *Ex parte Jones*, 2 Cro. & Jer. 513; S. C. 2 Tyrw. 671.

(1) The principal of this provision is their ownership and possession, has been doubtless incorporated into the laws of the for the first time introduced into this United States by the Act of Congress of country, except so far as the laws of some the 29th of July, 1850, cited in note (1), of of the States may have previously sanctioned the preceding page. By virtue of that act, tioned such hypothecations. the mortgaging of vessels without changing

possession of the vessel before the conclusion of her voyage, he will be entitled to the whole of the accruing freight for payment of his debt (*n*).

Sometimes a vessel is hired for a given voyage. The instrument by which such hiring is effected is termed a charter-party. Whether the legal possession of the ship passes to the hirer, (or charterer, as he is called) depends on the stipulations contained in the charter-party, such as whether the charterer or the owner is to provide the seamen, and keep the vessel in order (*o*). Where a merchant ship is open to the conveyance of goods generally, it is called a general ship. The receipt (1) for the goods given by the master is called the *bill of lading*: (2) it states that the goods are to be delivered to the con-

(*n*) *Dean v. M'Ghie*, 4 Bing. 45; * *S. C.* 12 J. B. Moore, 185; *Kerswill. v. Bishop*, 2 Cro. & Jer. 529; * *S. C.* 2 Tyrw. 602.

(*o*) *Dean v. Hogg*, 10 Bing. 345; * *Fenton v. City of London Steam Packet Company* 8 Ad. & Ell. 835.*

(1) It is usual for the mate to sign a receipt for the goods shipped, at the time of their delivery at or on board the vessel, and to deliver it to the shipper. This again is surrendered, when the bill of lading has been signed by the master and delivered to the shipper.

(2) A bill of lading, is the written acknowledgment of the master of a vessel, that he has received certain specified merchandize from the shipper, to be conveyed on the terms therein expressed, to their destination, and at that place to be delivered to the parties therein designated; *Abbott on Shipp.* 323. Much legal learning and talent has been exercised in developing the law of this instrument, the principal heads of which may be succinctly enumerated as follows:

1st. The effect of a bill of lading as evidence of the ownership of the goods by the consignees.

A. of Liverpool, shipped goods, which, by the bill of lading, were to be delivered to B. or his assigns, in Philadelphia. The freight was payable in Liverpool, and it appeared that the goods were shipped on account of A.:—Held, that the bill of lading vested the property in B., who

might maintain an action in his own name against the owner of the ship for the negligent carriage of the goods; *Griffith v. Ingledew*, 6 Serg. & Raw. R. 629. See also *Sammerell v. Elder*, 1 Binn. R. 106; *Ryberg v. Snell*, 2 Wash. C. C. R. 403. But the property will not vest in the consignee, until the bill of lading has been delivered to him by the consignor, or some one authorized by him to make this delivery; *Walter v. Ross*, 2 Wash. C. C. R. 283; *Stille v. Traverse*, 3 Wash. C. C. R. 43; *Allen v. Williams*, 12 Pick. R. 297; *Low v. De Wolf*, 8 Id. 100.

2d. The effect of an endorsement of a bill of lading as a transfer of property.

Bills of lading are transferable by endorsement; and when thus transferred by a consignee to a *bona fide* purchaser for a good consideration, without notice of adverse claims, they pass the legal title of the property to the endorsee. And where the endorsee, without any laches on his part, takes possession of the property as soon as its arrival from sea is known to him, an attachment levied on the property after the assignment, will be ineffectual and inoperative; *Winslow v. Norton*, 29 Maine (16 Shep.) R. 419. So, where

signee or his assigns; and by the custom of merchants, the bill of lading, when endorsed by the consignee with his name, *becomes a negotiable instrument, the delivery of which passes the [*57]

the master of a vessel signs bills of lading to third parties, *bona fide*, assignees of such bills, for value, will be entitled to hold the property as against the charterer of the vessel; *Zachrisson v. Ahman*, 2 Sandf. Sup. Ct. R. 68.

See also, *Chandler v. Belden*, 18 Johns. R. 157; *Dawes v. Cope*, 4 Binn. R. 258; *Walter v. Ross*, 2 Wash. C. C. R. 294. But though a bill of lading is *prima facie* evidence of property, in the hands of a *bona fide* endorsee for a valuable consideration, yet the endorsement may be explained in certain circumstances, according to the intention of the party; *Low v. De Wolf*, 8 Pick. R. 107; *Hibbert v. Carter*, 1 T. R. 745.

Nor will the endorsement of a bill of lading, without a delivery of it, transfer the property in the goods mentioned in it, as against the attaching creditors of the endorser; *Buffington v. Curtis*, 15 Mass. R. 528. See also, on this head, the cases cited in *Abbott on Shipp.*, by Story, p. 638, note (1).

3d. The effect of a bill of lading as a contract.

(A) As to the condition, contents, and quantity of the goods specified in the instrument.

An acknowledgment in a bill of lading, that certain cases of goods were "shipped in good order," "contents unknown," extends only to the external condition of the cases, and not to the condition or package of the goods; *Clark v. Barnwell*, 12 Howard R. 272. But in an action against the owners of a steamboat, to recover for the loss of a quantity of molasses contained in barrels, which the captain of the vessel had received on board at New Orleans, and for which he signed a bill of lading, stating it to have been received in good order and well-conditioned, and to be deliverable to the plaintiff in Pittsburgh, it was held, that

the defendant could not go into evidence to prove that the barrels were not full when delivered on board, and that they were in so bad order as to leak. In such case, the loss of hoops, and leakage occasioned thereby, which occurred while the consignor was carrying the casks to the wharf, and unloading them from the drays, so that the captain might put them in his boat, when seen and known by the carrier, was not such a latent defect as would excuse the carrier; *Warden v. Greer*, 6 Wat. R. 424.

And although, as between the shipper of goods and the owner of the vessel, the bill of lading may be explained so far as to show the quantity of the goods, their condition, and the like; yet, as between the owner of the vessel, and an assignee for a valuable consideration, paid on the strength of the bill of lading, it may not be explained; *Dickerson v. Seelye*, 12 Barb. S. R. 99. As a general rule, an action founded on the express contract contained in a bill of lading, should be instituted by the shipper, with whom the master contracted, or by the owner of the goods, where the shipper acted as his agent. An endorsement of the bill of lading does not assign the contract contained in it. When a bill of lading, by which goods are made deliverable to a consignee by name, is transmitted to him for advances, or to indemnify him against liabilities in respect to the consignment which they represent, it vests in him a property in the goods, general or special, at the time of the delivery on board, and renders the master responsible to him; *Dows v. Cobb*, 12 Barb. S. R. 310.

A charter party was made between A and B, by which A agreed to bring from Pictou, to New York, a cargo of coal, the freight of which should be paid at the rate of four dollars per chaldron, Pictou measure of thirty cwt., by an approved acceptance within thirty days from discharging,

property in the goods (*p*), but not the right to sue upon the contract contained in the bill of lading to carry and deliver the goods (*q*). The money payable for the hire of a ship, or for the carriage of goods in it, is the *freight*, which, whether accrued or accruing, is assignable in the same manner as any other ordinary chose in action (*r*).

(*p*) *Caldwell v. Ball*, 1 T. Rep. 205, 216.

(*q*) *Thompson v. Dominy*, 14 M. & W. 403.*

(*r*) *Douglas v. Russell*, 4 Sim. 524; 1 M. & K. 488; *Leslie v. Guthrie*, 1 New Cases, 697.*

for which twelve days were allowed. The bill of lading stated the cargo at four hundred chaldrons, weight of which was unknown. It turned out that there were nearly four hundred and sixty chaldrons of thirty cwt. B's agent offered to pay in cash for four hundred chaldrons at the agreed rate, which was refused by A. Held, that the words "thirty cwt." were descriptive of the weight of a chaldron, and therefore that A was entitled to freight for four hundred and sixty chaldrons, and that B's offer to pay but for four hundred chaldrons, and his refusal to pay any more, released A from his obligation to wait thirty days after the discharge, within which time he began this suit; *Ward v. Whitney*, 3 Sandf. Sup. Ct. R. 399.

(B) The effect of a bill of lading as a contract, and who may sue on it.

A bill of lading promising to deliver goods to A or his assigns, was sent by A to B, unendorsed, in a letter containing no words of transfer. Held, that B could maintain no action against C, the owner of the vessel, as surviving owner or as assignee of the goods, and that C having delivered part of the goods to B, was not

thereby estopped to deny his claim to the residue; *Stone v. Swift*, 4 Pick. R. 389.

Where the master of a vessel signed a bill of lading to deliver the whole of a quantity of coffee, shipped on board his vessel, to one party, and subsequently signed another bill of lading, to deliver a part of the same to another party, held, that he was liable to the second party, although he had delivered the whole of the coffee to the first; *Stille v. Traverse*, 3 Wash. C. C. R. 43.

A, an agent of B, contracted with C, a common-carrier, to deliver a quantity of wheat to B, in New York. A bill of lading was drawn and signed, containing the agreement. The wheat having been delivered to D, in New York, for whom A was also agent, B sued C for damages, for breach of contract, and evidence was offered that A gave parol directions to C to deliver the wheat to D. Held, that a bill of lading was of a two-fold character as far as it was a receipt, that it could be explained by parol evidence, but as a contract for forwarding, it could not be altered by parol testimony, and that such evidence therefore, in this case was inadmissible; *Wolfe v. Myers*, 3 Sandf. Sup. Ct. R. 7.

*PART II.

[*58]

OF CHOSSES IN ACTION.

CHAPTER I.

OF ACTIONS EX DELICTO.

IN addition to moveable goods, or *choses in possession*, we have observed (a), that there existed also in ancient times *choses in action*, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong or the nonperformance of a contract, or else to procure the payment of money due. The actions to be thus brought were, of course, not real, but purely personal actions. Real actions were brought for the recovery of land or real property; but the above mentioned actions were against persons only, and the object was merely to obtain from them money, being the only recompense generally available. In this respect the law has undergone no change. A money payment is all it can generally obtain for the person aggrieved (b); although equity, if resorted to in the Court of Chancery, will often give a more appropriate remedy, by issuing an *injunction* to restrain the wrong-doer from continuing his wrong, or by decreeing the *specific performance* of a contract. In many cases, however, money is a sufficient recompense; and then the right to bring an action at law, in other words a legal chose in action, constitutes a valuable kind of personal property.

The infliction of a wrong, and the nonperformance of *a contract, are evidently the two grand sources from which personal actions ought to proceed. If one man commits a wrong against another, justice evidently requires that he should give him satisfaction, and if one man enters into a contract with another, he certainly ought to keep it, or make reparation for its breach; or if the contract be to pay a sum of money, the money ought to be duly paid. Personal

(a) Ante, p. 4.

(b) The actions of *detinue* and *replevin* are exceptions, see ante, p. 3.

actions are accordingly divided by the law of England into two great classes, actions *ex delicto*, and actions *ex contractu* (c). The former arises in respect of a wrong committed, called in law French a *tort*; the latter, in respect of a contract made for the performance of some action, which thus becomes a *duty*, or for the payment of some money, which thus becomes a *debt*. Let us consider, in the present chapter, the right of action which occurs *ex delicto*, or in respect of a *tort*.

The ancient law, in its dread of litigation, confined the remedy by action for a *tort* or wrong committed, to the joint lives of the injurer and the injured. If either party died, the right of action was at an end, the maxim being *actio personalis moritur cum personâ* (d). In this rule, actions *ex delicto* only were included; of which, however, there seem to have been more than any other in early times. But by an early statute (e), the same action was given to the executor for any injury done to the personal estate of the deceased in his lifetime, whereby it became less beneficial to the executor, as the deceased himself might have brought in his lifetime (1). And by a recent statute (f),

(c) 3 Black. Com. 117.

(d) 1 Wms. Saund. 216, a, n.(1).

(e) Stat. 4 Edw. III. c. 7, de bonis asportatis in vita testatoris, extended to executors of executors by stat. 15 Edw. III. c. 5.

(f) Stat. 3 & 4 Will. IV. c. 42, s. 2.

(1) The provisions of the statute 4th Edw. III., c. 7, if not the statute itself, and the judicial interpretations of it, have been adopted in almost every State of the Union; under this enactment, it is held, that an action of tort survives to the representatives of one whose personal property has been injured. Thus in Alabama, *Nettles v. Barnett*, 8 Porter's R. 181; *Coker, adm'r, v. Crozier*, 5 Ala. R. 369; 16 Ala. R. 698. In Kentucky, *Kennedy et al. v. McAfiel's exe'x*, 1 Lit. R. 169; *Lynn's adm'r v. Lisk*, 9 B. Monroe's R. 135. In Maine, *Hill, adm'r, v. Penny*, 17 Maine R. 410. In Maryland, *Fister v. Beale's adm'rs*, 1 Har. & Johns. R. 31; *Kennerly, exe'x, v. Wilson*, 1 Mary. R. 102. In Missouri, *Higgins v. Breen, adm'r*, 9 Misso. R. 500; *Smith, adm'r, v. Grove*, 12 Misso. R. 52. In New Hampshire, *French, adm'r, v. Merril*, 6 N. H. R. 465. In New Jersey, *Norcross v. Boulton*, 1 Harrison's R. 312; *Stewart v. Richey*, 2 Id. 164. In New York, *Babcock v. Booth*, 2 Hill's R., 184; *Snyder, et al., exec's, v. Croy*, 2 Johns. R. 227. In North Carolina, *Arnold v. Exe'x of Lanier*, 1 Carol. L. Reg. 529; *McKinnis's exec's v. Oliphant's exec's*, 1 Hayw. R. 3. In Pennsylvania, *Clarke v. McClelland*, 9 Barr's R. 128; *Kline v. Guthart*, 2 Penna. R. 491; *Keito, adm'r, v. Boyd*, 16 Serg. & Raw. R. 300; *Nicholson, et al., exec'rs, v. Elton, adm'r*, 13 Id. 415; *Reist, adm'r, v. Heibrenner*, 11 Id. 131. In Massachusetts, *Pitts v. Hale*, 3 Mass. R. 321; *Jenney v. Jenney*, 14 Id. 232; *Mellen et al. v. Baldwin*, 4 Id. 480; *Towle, adm'r, v. Lovet*, 6 Id. 394. In Georgia, *Robinson v. McDonald*, 2 Kelly's R. 120. So in Connecticut, *Kirby, adm'r, v. Clark*, 1 Root's

an action is given to the executors or administrators of any person deceased, for any injury to the real estate of such person, committed within six calendar *months before his death, for which an [*60] action might have been maintained by him; so that the action

R. 389. So in South Carolina, Exec's of Middleton v. Robinson, 1 Bay's R. 58. So in Tennessee, Douglass v. Morford, 7 Yerg. R. 84; Cheep v. Wheatley, 11 Humph. R. 557. In Vermont, Hall, adm'r, v. Walbridge, 2 Aiken's R. 215; Manwell, adm'r, v. Briggs, 17 Vt. R. 181; Adm'r of Barrett v. Copeland, 20 Id. 247; Dana, adm'r, v. Lull, 21 Id. 389; Bellows v. Adm'r of Allen, 22 Id. 108. And in Virginia, Morris, adm'r, v. Dawney, et al., adm'rs, 3 Hen. & Munf. R. 127; Vaughan's, adm'r, v. Winklee's exec., 4 Munf. R. 136. This principle has also been adopted by the Supreme Court of the United States; Unit. Sts. v. Daniel, et al., 6 How. R. 13; and see also Hatch v. Eustice, 1 Gallis. C. C. R. 160. In Ohio, it has been decided, that the representatives of a decedent, can only maintain such action as their testator or intestate might, if living; Benjamin v. Le Baron's adm'r, 15 O. R. 526.

In many of the States, it is also held, that an action for a tort may be maintained against the representatives of the wrongdoer, for an injury done to personal property; where this rule prevails, it depends for the most part, on the acts of the legislatures of the States. Even where this doctrine, is denied, if the property of the decedent has been benefited by the wrongful act, some other remedy may be had, to recover, the amount by which the estate has been benefited, or, the specific thing, or its value, which the estate has gained.

The courts of Kentucky, Maryland, Missouri, New Jersey and North Carolina, have decided, that tort for an injury to personal property, will survive against the representatives of the wrongdoer; Kennedy, et al., v. McAfiel's exe'x, 1 Lit. R. 169; Lynn's adm'r v. Sisk, 9 B. Munroe's R. 135; Brummett v. Golden et al. adm'rs, 9 Gill's

R. 95; Higgins v. Breen, adm'r, 9 Misso. R. 500; Jewett v. Weaver, adm'r, 10 Id. 234; Mount v. Exec's of Cubberly, 4 Harrison's (N. J.) R. 124; Tahume v. Exec's of Bray, 1 Id. 53; Arnold v. Exe'x of Lanier, 1 Caro. L. Reg. 529; Helme v. Sanders, 3 Hawks. R. 565; Cutler et al. v. Brown's exec's, 2 Hayw. R. 182; Spivey v. Farmer's adm'r, Id. 339; McKinnis's exec's v. Oliphant's exec's, 1 Id. 3; Decrow v. Monis's exec's, Id. 21; Clark v. Keenan et al., Id. 308; Avery v. Moore's exec's, Id. 362. So also, it seems, in Virginia, Vaughan's adm'r v. Winkler's exec., 4 Munf. R. 136. In Georgia, an action of deceit may be brought against an administrator for the fraud of his intestate; Adm'r of Gruse v. Bryant, 2 Kelly's R. 66. By the law of New York, though an action of tort may be brought, yet it can only be in those cases where the estate of the wrongdoer is increased, or benefited by his trespass; Troup v. Exec's of Smith, 20 Johns. R. 23; The People v. Gibbs et al. exec's, 9 Wend. 29; 2 Kt. Com. 416. The law of Pennsylvania is somewhat singular; while an action of replevin may be maintained against the representatives of a decedent, Harlan v. Harlan, 5 Har. R. 513; Keito, adm'r, v. Boyd, 10 Serg. & Raw. R. 300; Sharick v. Huber, 6 Bin. R. 3; Weaver v. Lawrence, 1 Dal. R. 157, and also an action on the case for deceit, Boyd's exec's v. Browne, 6 Barr's R. 311, an action of trover, or trespass *vi et armis* cannot be brought, Heuch et ux., adm'rs, v. Metzger et al. exec's, 6 Serg. & Raw. R. 272; Keito, adm'r, v. Boyd, 16 Id., 300; Lattimore et al. exec's, v. Simmons, 13 Id. 184; Nicholson et al., exec's, v. Elton, adm'r, 13 Id. 415. In Arkansas, an action of replevin, begun against one who dies, will survive, by statute, against one who might originally be prosecuted for the same

be brought within six years after the death of such person; and the damages, when recovered, are to be part of the personal estate of such person (1). And by a still more recent statute (g), it is provided, that whenever the death of a person shall be caused by such wrongful act,

(g) Stat. 9 & 10 Vict. c. 93.

cause of action; *Dixon v. Thatcher's Heirs*, 3 Eng. R. 137.

In almost all of those States in which an action of tort will not lie against the executor or administrator, of a testator or intestate who has committed some injury to personal property, some other remedy is available to the injured party, if the estate of the wrongdoer has been benefited by his wrong. Thus in Alabama, *Nettles v. Barnett*, 8 Porter's R. 181; *Coker, adm'r, v. Crozier*, 5 Ala. R. 369; 16 Id. 398. So in Massachusetts, *Cravath v. Plympton, adm'r*, 13 Mass. R. 394; *Jarvis, adm'r, v. Roger*, 15 Id. 398; *Pitts v. Hale*, 3 Id. 321; *Jenney v. Jenney*, 14 Id. 232; *Barnard v. Harrington*, 3 Id. 228; *Badlam, exec., v. Tucker*, 1 Pick. R. 284; *Perry v. Wilson*, 7 Mass. R. 395; *Mellen et al. v. Baldwin*, 4 Id. 480. So also in South Carolina, *Exec's of Middleton, v. Robinson*, 1 Bay's R. 58. In Tennessee, by the Act of 1835-6, c. 77, all actions, except for wrongs affecting the person or character of the plaintiff, commenced by or against a deceased person in his lifetime, may be revived by or against his representatives; and even before that statute, the law would give a remedy for injury to personal property, though an action of tort, technically speaking, might not survive; *Norment v. Smith*, 1 Hump. R. 46; *Jones v. Littlefield*, 3 Yerg. R. 144; *Cocke v. Trotter*, 10 Id. 213. In Maine it has been held, that upon the death of the defendant in replevin, the suit abates, the administrator not being authorized to come in and defend; *Merritt v. Lumbert*, 8 Greenl. R. 128. In Indiana, although an action of waste cannot be brought by an administrator *de bonis non*, against the administrator of the original administrator, yet it may be maintained by

the creditors of the original intestate; *Ferguson et al. v. Sweeney*, 6 Black. R. 547; *Lewis, adm'r, v. Houston*, 7 Id. 335; *Young v. Kimball*, 8 Id. 167. In Mississippi and Louisiana, actions commenced do not abate by the death of either party; *Torry et al. v. Robinson*, 2 Cush. (Miss.) R. 193; *Purtevant v. Pendleton's adm'r*, 1 Id. 41; 1 La. R. 111; 6 Id. 301; 11 Id. 357; 6 Robinson's R. 44; 1 Id. 522.

(1) Whether an action of tort can be maintained by the representatives of a decedent, for an injury done to his real property; as also whether the representatives of a trespasser upon real property can be made defendants in a suit brought to recover damages for such an injury, has not been so generally decided by the courts of the several States, as the inquiries concerning the surviving of actions for injuries to personal property.

The former question has been decided in the affirmative by the courts of Maryland, Massachusetts, Vermont and Connecticut; *Kennerly, exe'x, v. Wilson*, 1 Mary. R. 102; *Wilbur, exec., v. Gilmore*, 21 Pick. R. 250; *Boynton et al. v. Rees*, 9 Id. 528; *Goodridge v. Rodgers, adm'r*, 22 Id. 495; *Stanley, adm'r, v. Gaylord*, 10 Metc. R. 82; *Northampton Paper Mills v. Ames et al.*, 6 Id. 422; *Griswold, adm'r, v. Brown et al.*, 1 Day's R. 180; *Bellows, adm'r, v. Allen*, 22 Vt. R. 108; *Admr. of Barrett v. Copeland*, 20 Id. 247. The authority of Maine, and perhaps of Virginia, is in the negative; *Hill, adm'r, v. Penny*, 17 Maine R. 410; *Harris v. Crenshaw*, 3 Rand. R. 14. In Pennsylvania, the authorities are conflicting, *Keito, adm'r, v. Boyd*, 16 Serg. & Raw. R. 300, giving an action to the representatives of a decedent for a trespass *de bonis asportatis*, and *Lattimore et al., exec's, v.*

neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the wrongdoer shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Under this act, one action only can lie for the same subject-matter of complaint; and such action must be commenced within twelve calendar months after the death of the deceased (*h*), in the name of his executor or administrator (*i*), and must be for the benefit of the wife, husband, parents, grandfather and grandmother, stepfather and stepmother, children, grandchildren and stepchildren of the deceased, in such shares as the jury shall direct (*k*). Previously to this statute, a man who had been maimed by another could recover compensation for the injury; but if he died of his wound, his family could obtain no recompense for the loss of a life which might have been their only dependence (1). And even now, when the death *of a person [**61*] is not *caused*, no action can be brought by his executor or ad-

(*h*) Sect. 3.

(*i*) Sect. 2.

(*k*) Sects. 2, 5. This act is a specimen of the common absurdity of modern acts of parliament, in introducing an interpretation clause in one section just to vary the meaning of another. It enacts in one section, that the action shall be for the benefit of the wife, husband, parent and child; and in another section, that the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child," shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter. Now the words "parent" and "child" occur only in the one place just mentioned, besides this interpretation clause. Why not, therefore, say at once what is really intended?

Simmons, 13 Serg. & Raw. R. 184, deciding that no action will survive to the representatives for an injury to the freehold.

That tort for injuries to real property, will survive against the representatives of the wrongdoer, has been held in Kentucky; *Kenney et al. v. McAfiel's exe's*, 1 Lit. R. 169. So also, perhaps, in North Carolina and Vermont, *Dobbs v. Gullidge*, 3 & 4 Dev. & Bat. R. 68; *McPherson v. Leguire*, 3 Dev. R. 153; *Arnold v. Exe's of Lanier*, 1 Caro. L. Reg 529; *Burgess v. Gates, exe's*, 20 Vt. R. 326. In New York and New Jersey this action may also be maintained, provided a benefit has accrued to the estate of the wrongdoer, 2 Kt. Com.

416; *Cooper v. Crane*, 4 Halst. R. 177. In Texas, the administration of the whole estate, both real and personal, is by law cast upon the administrator, who can therefore bring and maintain suits for lands belonging to his intestate, *Graham v. Vining, adm'r*, 2 Texas R. 433.

(1) An Act of the Legislature of Pennsylvania, of the 15th of April, 1851, provides, that no action for injuries to the person, happening through negligence, default or violence, shall abate by the death of the plaintiff; the words of the act are: "No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal repre-

ministrator for any injury which affected him personally, if it did not touch his property. Thus it has been held, that an executor or administrator cannot have an action for a breach of promise of marriage with the deceased where no special damage can be stated to have accrued to her personal estate (*l*).

Not only the death of the injured party, but also that of the wrongdoer, formerly put an end to every action which arose from a *tort* or wrong; and this was the case up to a very recent period; although if the executor or administrator had profited by the wrong done, the injured party was able to recover from him the money or goods he had thus gained (*m*) (1). But by a recent statute (*n*) an action may now be maintained against the executors or administrators of any person deceased, for any wrong committed by him within six calendar months before his death against another person, in respect of his property real or personal; so as such action be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person (2). And the damages to be recovered in such action are to be payable in the like order of administration as the simple contract debts of such person. The remedy afforded by this statute does not preclude such action as might have previously been brought against the executor or administrator (*o*).

There is one peculiar action founded 'on *tort*, to which, from the nature of the case, the deceased himself cannot be liable, but which is

(*l*) Chamberlain v. Williamson, 2 Mau. & Sel. 408, 415.

(*m*) Powell v. Rees, 7 Ad. & El. 426.*

(*n*) Stat. 3 & 4 Will. IV. c. 42, s. 2.

(*o*) Powell v. Rees, *ubi supra*.

sentatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction."

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action and recover damages for the death thus occasioned." Purdon's Dig. Eighth Ed., p. 198.

A statute of Massachusetts (1842, c. 89, § 1,) is somewhat similar, providing that actions on the case for damages to the person shall survive; but the courts of that State have decided, that the personal damages mentioned in this statute, mean only physical injuries; *Smith v. Sherman*, 4 Cush. R. 408; *Walters v. Nettleton*, 5 Cush. R. 544; *Nettleton v. Dinehart*, 5 Cush. R. 543.

(1) See *ante*, p. 59, note (1).

(2) See *ante*, p. 60, note (1).

maintainable by the common law against his executors or administrators. This is the action *for dilapidations of the houses or [*62] buildings on a benefice; and it is brought by the new incumbent whether of a rectory, vicarage, or perpetual curacy (*p*), against the executors or administrators of his predecessor. This action cannot be said to be an exception to the rule *actio personalis moritur cum persona*, for the deceased is not liable during his lifetime; the plaintiff must be the succeeding incumbent; and an action cannot be said to die which never had or could have any existence (*q*). However in the case of resignation or exchange, the preceding incumbent is himself liable for dilapidations (*r*). In estimating the damages to be recovered in this action, the rule is as follows:—The incumbent is bound to maintain the parsonage, farm buildings, and chancel in good and substantial repair, restoring and rebuilding, when necessary according to the original form, without addition or modern improvement; and he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong (*s*). And no damages can be recovered on account of neglect to cultivate the glebe lands in a husbandlike manner (*t*).

*CHAPTER II.

[63*]

OF CONTRACTS.

PERSONAL actions, we have observed (*a*), may be brought not only on account of the infliction of a wrong, but also to recover pecuniary damages for the nonperformance of a contract, or to procure the payment of money due, if the payment of a specific sum be the subject of the contract. As the payment of money is the law's ultimate remedy in personal actions, an action for a given debt will be effectually satisfied by a judgment that the plaintiff do recover his debt; and this is the judgment accordingly given in an action of debt, which lies for the recovery of a specific sum due from the defendant to the plaintiff (*b*). But when no specific sum is claimed, the action can only, in the law phrase, *sound in damages*; and the amount of the damages to be

(*p*) *Mason v. Lambert*, 12 Q. B. 795.*

(*q*) *Sollers v. Lawrence*, Willes, 421.

(*r*) *Downes v. Craig*, 9 Mee. & Wels. 166.*

(*s*) *Wise v. Metcalf*, 10 Barn. & Cress. 299.*

(*t*) *Bird v. Ralph*, 4 Barn. & Adol. 826.*

(*a*) *Ante*, p. 4.

(*b*) *Stephen on Pleading*, 116.

recovered must be assessed by a jury according to the injury sustained (*c.*) It is, however competent to the parties to a contract to agree between themselves, that, in the event of a breach by either party, a given sum shall be recovered from him by the other as stipulated or liquidated damages; and in this case the whole of the sum thus agreed on may, on a breach of the contract, be recovered from the defaulter (*d.*) The sum so agreed on is not properly called a penalty; for, as we shall see hereafter when speaking of bonds, the law regards a penalty [*64] as a security only for the damage* actually sustained; although the use of the word *penalty* will not prevent the whole sum from being recovered, if this be clearly the intention (*e.*) But where a sum of money is stipulated to be recovered as liquidated damages in case of the breach of an agreement to do several acts, and such sum will, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury occasioned, such sum will not be allowed to be recovered in case of any breach, but damages only, proportioned to the actual injury which the breach has occasioned (*f.*) In such a case, if the parties wish to bind themselves to pay liquidated damages, they must contract in clear and express terms, that for the breach of each and every stipulation contained in the agreement, a sum certain is to be paid; and in that case, although the stipulations may be of various degrees of importance, the parties will be held to their contract (*g.*) (1)

(*c.*) Ibid. p. 117. By the Common Law Procedure Act. 1852, stat. 15 & 16 Vict. c. 76, it is now provided, that where the amount of damages sought to be recovered is substantially a matter of calculation, the amount for which final judgment is to be signed may be ascertained by one of the Masters of the Court (s. 94); and that in all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages (s. 95.)

(*d.*) *Reilly v. Jones*, 1 Bing. 302; * *S. C.* 8 Moore, 244; *Sugd. Vend. & Pur.* 221; *Leighton v. Wales*, 3 Mee. & Wels. 545; * *Price v. Green*, 16 M. & W. 346, 354; * *Galsworthy v. Strutt*, 1 Exch. Rep. 659; * *Atkyns v. Kinnier*, 4 Exch. Rep. 776.*

(*e.*) *Sainter v. Ferguson*, 7 C. B. 716.*

(*f.*) *Kemble v. Farren*, 6 Bing. 141; * *S. C.* 3 Moo. & Pay. 425; *Davies v. Penton* 6 Bar. & Cress. 216, 223; * *S. C.* 9 Dowl. & Ry. 369; *Horner v. Flintoff*, 9 Mee. & Wels. 678, 681.*

(*g.*) *Per Parke, B.*, 9 Mee. & Wels. 680.* See *Atkyns v. Kinnier*, 4 Exch. Rep. 776.*

(1) In interpreting a contract, which provides, that upon its non-fulfillment, a sum agreed upon shall be paid by the defaulting party, it is often a matter of great difficulty, to determine whether the sum so specified to be paid, is a penalty, or liquidated damages. This difficulty is not lessened, by the fact, that the use of the words "penalty" or "liquidated damages," affords no sufficient aid in arriving at a

So much then for the legal remedies for a breach of contract. Let us now inquire more particularly of what a contract itself consists.

conclusion; it having been frequently decided, where the parties have called the specific sum "liquidated damages," it is, nevertheless, a "penalty," and *vice versa*; the only safe rule of interpretation, in this country as in England, is based upon the inquiry, What is the intention of the parties to the contract? and this question must be answered by taking a comprehensive view of the whole contract, and not by confining the examination to any isolated word or sentence: Watt's exec's v. Sheppard, 2 Alabama R. 425; Carpenter et al. v. Lockhart, 1 Carter's Inda. R. 435; Heard v. Bowers et al., 23 Pick. R. 455; Shute v. Taylor, 5 Metcf. R. 51; Brown v. Bellows, 4 Pick. R. 179; Beale v. Hayes, 5 Sandf. Superior C. R. 641. The tendency, however, of the decisions of the courts, is towards determining the sum specified in the contract, to be a penalty: Shute v. Taylor, 5 Metcf. R. 51; Moore et al. v. Platte County, 8 Misso. R. 467; Cheddick's exec., v. Marsh 1, Zabriskie's R. 463; Tayloe v. Sandiford, 7 Wheat. R. 13; and consequently, where the word "penalty" is used, it must clearly appear that the parties intended it should be liquidated damages, or it will be interpreted to be a penalty.

In 2d Greenleaf's Evidence, §§ 258, 259, certain rules will be found to ascertain the intention of the parties to a contract as to this point.

Thus, it has been held to be a penalty; First, "Where the parties, in the agreement have *expressly declared*, the sum to be intended as a forfeiture, or penalty, and no other intent is to be collected from the instrument:" Stearns v. Barrett, 1 Pick. R. 443; Brown v. Bellows, 4 Id. 179; Abrams v. Kounts et al., 4 Ohio R. 214; Robeson et al., exec's, v. Whitesides, 16 Serg. & Raw. R. 320; Tayloe v. Sandiford, 7 Wheat. R. 13.

Second. "Where it is *doubtful*, whether it was intended as a penalty, or not; and

a certain damage, or debt, less than the penalty, is made payable, on the face of the instrument:" Dakin et al. v. Williams et al., 17 Wend. R. 447, S. C. 22 Id. 201; Baird v. Tolliver et al., 6 Hump. R. 186; Waller v. Long, 6 Munf. R. 71; Watt's exec's v. Sheppard, 2 Alaba. R. 425; Number of Cases, Alaba. R. 209; Plummer v. McKean, 2 Stew. (Ala.) R. 423; Hamilton v. Overton et al., 6 Blackf. R. 206; Taul v. Everett, 4 J. Marsh. R. 10; Churchwardens et al. v. Peytavin, 2 Condens. R. S. C. La. 493; Reynolds v. Yarborough, 7 La. R. 193; Baxter et al., exec's, v. Wales, 12 Mass. R. 365; Beale v. Hayes, 5 Sandf. Super. C. R. 641; Brockaway v. Clark, 6 Ohio, R. 50; Allen v. Brazier et al., 2 Bailey's, R. 293; Kellog v. Curtis, adm'r, 9 Pick. R. 534; United States v. Gurney et al., 4 Cranch's R. 333. But see to the contrary, Jordan v. Lewis, 2 Stew. R. 426, and Cutler v. How., 8 Mass. R. 257.

Third. "Where the agreement was evidently made for the attainment of another object, to which the sum specified is *wholly collateral*:" Broadwell et al., to the use, &c., v. Broadwell, 1 Gilman's (Ill.) R. 600: It has been so held where the principal contract was to convey a tract of land; Dyer v. Dorsey et al., 1 Gill & Johns. R. 440; Shute v. Taylor, 5 Metcf. R. 51; Lindsay v. Anesley, 6 Ired. L. R. 186; Dennis v. Cummins, 3 Johns. Cas. 297; or not to trade in a specified place; Perkins v. Lyman, 11 Mass. R. 76; or, to let the plaintiff have the use of a building, Merrill v. Merrill, 15 Mass. R. 488; or, to submit to an award, Hoag v. McGinnis, 22 Wend. R. 163; Whitcomb v. Preston, 13 Vt. R. 53.

Fourth. "Where the agreement contains *several matters of different degrees of importance*, and yet the sum named is payable for the breach of any, even the least:" Watt's exec's v. Sheppard, 2 Alaba. R. 425; Carpenter et al. v. Lockhart, 1 Cart. Inda. R. 435; Hamilton v. Overton et al., 6 Blackf. R. 206; McNair v. Thompson, 1

A contract then, as defined by Blackstone (*h*), is "an agreement upon sufficient consideration to do or not to do a particular thing." This

(*h*) 2 Bla. Com. 442.

Condens. R. S. C. La. 413; Moore et al. v. Platte County, 8 Misso. R. 467; Gower v. Saltmarsh, 11 Id. 271; Chaddick's exec. v. Marsh, 1 Zabriskie's R. 463; Bagley v. Peddie, 5 Sandf. Super. C. R. 192; Beale v. Hayes, Id. 641; Carry v. Sarer, 7 Barr's R. 470; Allen v. Brazier et al., 2 Bailey's R. 293; Tayloe v. Sandiford, 7 Wheat. R. 13; Danville Bridge Co. v. Pomroy et al., 3 Harris's R. 181; which last case is similar in principle to Faunce v. Burke et al., 4 Harris's R. 469, subsequently, decided contrariwise.

Fifth. "Where the contract is *not under seal*, and the damages are capable of being *certainly known* and estimated; and though the parties have expressly declared the sum to be as liquidated damages:" Watt's exec's v. Sheppard, 2 Alaba. R. 425; Spencer v. Tilden et al., 5 Cow. R. 144; Graham v. Bickham, 4 Dal. R. 149.

"On the other hand, it will be inferred that the parties intended the sum as *liquidated damages*. First. Where the damages are uncertain, and are *not capable of being ascertained*, by any satisfactory and known rule; whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case:" Watt's exec's v. Sheppard, 2 Alab. R. 425; Hamilton v. Overton et al., 1 Carter's Inda. R. 484; Gammon v. Howe, 14 Maine R. 250; Bright v. Rowland, 3 Howard (Misso.) R. 398; Dakin et al. v. Williams et al, 17 Wend. R. 447, S. C. 22 Id. 201; Hoag v. McGinnis, Id. 163. It has been decided, that the sum specified, was liquidated damages, and not a penalty, where the agreement was not to carry on a trade in a specified place; Miller v. Elliott, 1 Cart. Inda. R. 484; Peirce v. Fuller, 8 Mass. R. 223; Noble's adm'x v. Bates, 7 Cow. R. 307; Smith v. Smith, 4 Wend. R. 468; Mott v. Mott, 11 Barb. Suprem. C. R. 127; so, where it was agreed, to pay a certain

sum for the delay of each week, month, &c., in finishing a work, stipulated to be completed at a certain time; Curtis et al. v. Brewer, 17 Pick. R. 513; Worrel v. McClinaghan et ux., 5 Strobb. L. R. 115; Watt's exec's v. Sheppard, 2 Alaba. R. 425.

Second. "Where, from the nature of the case, and the tenor of the agreement, it is apparent, that the damages have already been the subject of actual and fair calculation and adjustment between the parties;" Alexander v. Troutman, 1 Kelly's R. 472; McNair v. Thompson, 1 Condens. R. S. C. La. 413; McGlorin v. Henderson et al., 6 La. R. 720; Price et al. v. Tucker, 5 La. Ann. R. 514; Graham v. Bickham, 4 Dal. R. 149. The cases exemplifying this principle, are, where the agreement was to pay a sum of money, in goods, at a certain price; Braham et al. v. Le Roy Pope et al., 1 Stew. (Alaba.) R. 135; Brooks v. Hubbard, 3 Conn. R. 58; or, to sell personal property, or to convey land, and in default thereof, to pay a specified sum; Tingley v. Cutler, 7 Conn. R. 291; Allen v. Brazier, 2 Bailey's R. 293; Heard v. Bowers et al., 23 Pick. R. 455; Hodges' exec. v. King, 7 Metef. R. 587; Cartwright et al. v. Gardener, 5 Cush. R. 273; Chamberlain v. Bagley, 11 N. H. R. 235; Mead v. Wheeler, 13 Id. 351; Hasbrouck v. Tappen, 15 Johns. R. 203; Stosson v. Beale, 7 Id. 72; Knapp v. Maltby, 13 Wend. R. 587; Gray v. Crosby, 18 Johns. R. 219; Pearson v. William's adm'rs, 24 Wend. R. 244, S. C. 26 Id. 630; Sawyer v. McIntire, 18 Vt. R. 27; or that, a security should become void, if put in suit before the time limited in a letter of license granted to the debtor; White v. Tingley, 4 Mass. R. 433; or, to pay a specified sum of money, if a certain receipt did not contain a true and proper method for making improved incorruptible teeth; Brewster v. Edgerly, 13 N. H. R. 275.

agreement may be either express or implied; for the law always implies a promise to do that which a person is legally liable to perform, and the action of *assumpsit* on promises is constantly maintained for damages for the breach of such an implied contract (*i*). Thus a person who takes the goods of a tradesman is liable in *assumpsit* *for their [*65] market value; for, as he took the goods, the law will imply for him a promise to pay for them. So a person who employs another to work for him impliedly contracts to give him reasonable remuneration; and a man who borrows money impliedly promises to repay it. And in all these cases the plaintiff, until recently, plainly stated that the defendant promised the plaintiff to pay him the money on request, and that the defendant had disregarded his promise, and had not paid the said moneys or any part thereof. But the common law procedure act, 1852, now requires that all statements of this kind shall be omitted (*k*).

Express contracts are either by parol, or word of mouth, which are called *simple contracts*, or by deed under seal, which are called *special contracts* (*l*); although simple contracts may, and often must at the present day, be evidenced by writing. Let us consider first mere parol or simple contracts. A parol contract then is an agreement by word of mouth, upon sufficient consideration, to do or not to do a particular thing. According to the law of England, a *consideration* is an essential ingredient in every contract: a promise without a consideration is regarded as *nudum pactum*, and no recompense can be recovered for its breach (*m*), neither will its performance be enforced in a court of equity (*n*). Thus if a man promise to give me 100*l*. without any consideration, he is not bound to perform his promise, and I am without remedy if he should break his word. So even if I should have done him any service, his subsequent promise to pay me money or otherwise benefit me, for a consideration already executed on my part, will not be binding, unless I should have done him the service at his request, in which case the promise will *relate back to the request (*o*), or [*66] unless a request can be implied from a subsequent allowance of

(*i*) Stephen on Pleading, 18.

(*k*) Stat. 15 & 16 Vict. c. 76, s. 49.

(*l*) Rann v. Hughes, 7 T. R. 351, n.

(*m*) Doctor & Student, dial. 2, c. 24; 2 Bla. Com. 445.

(*n*) 1 Fonb. Eq. 335 *et seq.*

(*o*) Hunt v. Bate, Dyer, 272, a; Lamplough v. Brathwait, Hob. 105; 1 Smith's Leading Cases, 67; Powle v. Gunn, 4 N. C. 445, 448; * Eastwood v. Kenyon, 11 Ad. & Ell 438, 451; * S. C. 3 Per. & Dav. 232; 1 Wms. Saund. 264, n. (1).

the service, or from other circumstances (*p*); and if the service rendered be of such a nature that the law will imply a promise in respect of it, any subsequent express promise different from that which the law will imply will be void, as *nudum pactum* (*q*). And if the service, or any part of it, has been illegal from being contrary to the common law, or to any statute, such illegal consideration will not support a promise. Thus a promise made in consideration that the other party had published a libel at the request of the person making the promise, and had also at the like request incurred certain costs, was held void on account of the illegality of part of the consideration, namely, publishing the libel, which vitiated the whole (*r*). And in like manner the circumstance of a woman's having cohabited with a man is not a valid consideration to support a promise made by him to pay her a sum of money (*s*).

Considerations are divided in law into two classes, *good* (sometimes called meritorious) and *valuable*. A good consideration is that of *blood*, or the natural love and affection which a person has to his children or any of his relatives (*t*). A valuable consideration may be either pecuniary, namely, the payment of money; or the gift or conveyance of [*67] anything valuable; or it may be *the consideration of the marriage of the party himself or of any relative; or any act of one party from which the other, or any stranger at his request, express or implied, derives any advantage; or any labour, detriment, inconvenience or risk sustained by the one party, if such labor be performed, or such detriment, inconvenience or risk be suffered by the one party at the request, express or implied, of the other, although such other may himself derive no actual benefit (*u*). A good consideration is not of itself sufficient to support a promise, any more than the moral obligation which arises from a man's passing his word; neither will the two together make a binding contract; thus a promise by a father to

(*p*) The maxim is *omnis rati habitio retrahitur et mandato æquiparatur*.—1 Wms. Saund. 264 b, n. (*e*).

(*q*) *Hopkins v. Logan*, 5 Mee. & Wels. 241, 247.*

(*r*) *Shackell v. Rosier*, 2 Bing. N. C. 634, 644.*

(*s*) *Binnington v. Wallis*, 4 B. & Ald. 650, 652.* See, however, *Gibson v. Dickie*, 3 Mau. & Sel. 463.

(*t*) 2 Black. Com. 297, 444.

(*u*) *Selwyn's Nisi Prius*, tit. *Assumpsit*, 46; 1 Wms. Saund. 211 d, n. (2); 2 Wms. Saund. 137 h, n. (*e*).

make a gift to his child will not be enforced against him (*v*). The consideration of natural love and affection is indeed good for so little in law, that it is not easy to see why it should be called a *good* consideration; for in law it is considered as not good against creditors within the statute 13 Elizabeth (*w*), in which the very phrase *good consideration* is used; it is not good to support a contract; and a gift for such consideration is regarded as simply voluntary (*x*). The only reason why such a consideration should be called *good*, appears to be, that in early times, previously to the passing of the Statute of Uses (*y*), the Court of Chancery enforced a covenant to stand seized of lands to the use of any person of the blood of the covenantor, on account of the goodness of the consideration; whence it has happened that, since that statute, the legal estate (being by that statute *annexed [*68] to the use (*z*)) will pass to a relative under a covenant to stand seized to his use (*a*). But the rules that anciently governed the Court of Chancery do not now regulate its proceedings (*b*); although modern equity will still interfere in favor of a wife or child in some cases in which it will not interpose on behalf of strangers (*c*).

A valuable consideration is therefore in all cases necessary to form a valid contract. It has indeed been thought that an express promise founded on a moral obligation, is sufficient for this purpose (*d*). This however appears to be a mistake. An express promise can give no original right of action, if the obligation on which it is founded could never have been itself enforced (*e*). But in some cases a valuable con-

(*v*) *Jeffery v. Jeffery*, 1 Craig. & Ph. 138; *Dillon v. Coppin*, 4 My. & Cr. 647; *Holloway v. Headington*, 8 Sim. 324; *Meek v. Kettlewell*, 1 Hare, 464; 1 Phil. 342. See, however, *Ellis v. Nimmo, Lloyd & Goold*, 333.

(*w*) *Twyne's case*, 3 Rep. 80 b; ante, p. 45.

(*x*) 2 Black. Com. 297.

(*y*) 27 Hen. VIII. c. 10.

(*z*) *Principles of the Law of Real Property*, 126 *et seq.*, 2nd ed.; 131, 3rd ed.

(*a*) *Ibid.* p. 159, 2nd ed.; 164, 3rd ed.

(*b*) *Ibid.* p. 131, 2nd ed.; 135, 3rd ed.

(*c*) *Ibid.* p. 239, 2nd ed.; 246, 3rd ed.

(*d*) *Lee v. Muggerridge*, 5 Taunt. 36.* This case may now be considered as virtually overruled by subsequent authorities mentioned in the next note.

(*e*) Note to *Wennall v. Adney*, 3 Bos. & Pull. 252; *Littlefield v. Shee*, 2 Barn. & Adol. 811; *Meyer v. Haworth*, 8 Adol. & Ellis, 467; * S. C. 3 Nev. & Per. 462; *Monkman v. Shepherdson*, 11 Adol. & Ell. 411, 415; * S. C. 3 Per. & Dav. 182; *Jennings v. Brown*, per Parke, B., 9 Mee. & Wels. 501; * *Eastwood v. Kenyon*, 11 Adol. & Ell. 447; * S. C. 3 Per. & D. 276; 2 Wms. Saund. 137 f, n. (*e*); *Beaumont v. Reeve*, 8 Q. B. 483.*

sideration, which might have formed a contract by means of an implied promise, had its operation not been suspended by some positive rule of law, may be revived and made available by a subsequent express promise (1). Thus a debt, barred by the debtor's having become

(1) The general rule of law prevailing in the several States of the Union, is, that a promise, made subsequent to the consideration upon which it is based, is not sufficient to support an action; *Barlow v. Smith et al.*, 4 Vt. R. 139; *Bulkley et al. v. Laudon et al.*, 2 Conn. R. 404, S. C. 3 Id. 76; *Jones v. Shorter et al.*, adm'rs, 1 Kelley's (Geo.) R. 294; *Waters et al. v. Simpson et al.*, 2 Gilm. (Illo.) R. 574; *Carson v. Clark*, 1 Scammon's R. 114; *Hutsen v. Overturf*, Id. 170; *Roberts v. Garen*, Id. 396; *Townsend v. Briggs*, Id. 472; *Boston v. Dodge*, 1 Blackf. R. 19; *Carr v. Allison*, 5 Id. 64; *Head's exec. and exe'x, v. Manner's adm'rs*, 5 J. J. Marsh. R. 257; *Balcolm, exec., v. Craggin*, 5 Pick. R. 295; *Andover, &c., v. Gould*, 6 Mass. R. 43; *Mills v. Wyman*, 3 Pick. R. 207; *Dodge v. Adams*, 19 Pick. R. 429; *Ridgway v. English*, 2 Zab. R. 416; *Phetteplace v. Steere*, 2 Johns. R. 443; *Frear v. Hardenburgh*, 5 Id. 272; *Tioga v. Seneca*, 13 Id. 380; *Watkins v. Halstead*, 3 Sandf. Super. C. R. 311; *Eble v. Judson*, 24 Wend. R. 97; 16 Johns. R. 283, n.; *Comstock v. Smith*, 7 Johns. R. 87; *Smith v. Ware*, 13 Johns. R. 257; *Hatchell v. Odom*, 2 Dev. & Bat. L. R. 302; *Johnson v. Johnson*, 3 Hawks' R. 556; *Snevily v. Read*, 9 Watts' R. 396; *Garrett v. Stuart*, 1 McCord's R. 515; *Massey v. Craine*, Id. 489; *Hanley v. Farrar*, 1 Vt. R. 420; *Parker v. Carter et al.*, 4 Munf. R. 273; *Bank of Washington v. Arthur et al.*, 3 Gratt. R. 173. There are, however, many cases, where a subsequent promise will support an action, and which, as exceptions to the general rule above stated, may be classified as follows:

First. Where a subsequent promise follows a previous request; *Carson v. Clark*, 1 Scam. R. 114; *Ridgway v. English*, 2 Zab. R. 416; *Frear v. Hardenburgh*, 5 Johns. R. 272; *Tioga v. Seneca*, 13 Id. 380; *Doty*

v. Wilson, 14 Id. 378; *Livingston v. Rogers*, 1 Caines' R. 583; *Comstock v. Smith*, 7 Johns. R. 87; *McMorris v. Herndon*, 2 Bail. R. 56; *Lonsdale v. Brown*, 4 Wash. Ct. Ct. R. 150.

Second. Where there has not been a previous express request, but one may be implied, from a subsequent recognition of the service performed, which must be beneficial to the one party, or detrimental to the other; thus, where one person pays the debt of another, and the debtor, thereupon, promises to reimburse him; *Keenan v. Holloway*, 16 Alaba. R. 53; *Weekly v. Burnhan et al.*, 2 Stew. R. 600; *Roundtree v. Holloway*, 13 Alaba. R. 359; *Roundtree v. Weaver*, 8 Id. 314; *Bertrand v. Byrd*, 2 Ark. R. 651; *Stocking v. Sage et al.*, 1 Conn. R. 519; *Gardner et al., v. Towsey*, 3 Litt. R. 426; or, where merchandize is delivered at one's house, and he to whom the goods are sent, sanctions the act by retaining them; *Gardner et al., v. Towsey*, 3 Litt. R. 426; *McMorris v. Herndon*, 2 Bail. R. 56; so, also, where two go bail for a third, and one of them, at much expense, surrenders the principal, and the other surety promises to pay his proportion of the expense; *Greeves v. McAllister*, 2 Bin. R. 591; and, the past use of money, has been held a good consideration to support a promise to pay interest; *Garland v. Lockett*, 5 N. S. (La.) R. 40; there are many other such cases; *Webster et al., v. Drinkwater*, 5 Greenlf. R. 322; *Farnham v. O'Brien*, 22 Maine R. 481; *Davenport v. Mason*, 15 Mass. R. 74; *R. & H. Stewart v. Eden*, 2 Caines R. 150; *Oatfield v. Waring*, 14 Johns. R. 192; *Doty v. Wilson*, Id. 378; *Parker v. Crane*, 6 Wend. R. 647; *Hicks v. Burhans et al.*, 10 Johns. R. 243; *Cunningham v. Garvin*, 10 Barr's R. 366.

Third. Where one is under a moral

bankrupt and obtained his certificate, might until recently have been enforced against him, if, after his bankruptcy, he had expressly promised to pay it (*f*); although such a promise was required by [*69] *the modern bankrupt acts (*g*) to be made in writing, signed by

(*f*) *Trueman v. Fenton*, Cowper, 544; *Kirkpatrick v. Tattersall*, 13 Mee. & Wels. 766.*

(*g*) 6 Geo. IV. c. 16, s. 131; 5 & 6 Vict. c. 122, s. 43.

obligation to do a certain act, and subsequently, makes an express promise, to do what he was bound by the prior moral obligation, to perform; *Commissioners of Canal Fund v. Perry*, 5 O. R. 48; *Hill v. Henry*, 17 Id. 9; *Shenk v. Mingle*, 13 Serg. & Raw. R. 29; *Nesmuth v. Drum*, 8 Wat. & Serg. R. 9; *McMorris v. Herndon*, 2 Bail. R. 56; *Glass v. Beach*, 5 Vt. R. 176. But it is not every moral obligation that will support a subsequent promise; for a promise to feed the hungry, or clothe the naked, or to perform acts of benevolence and charity, will not support an action; as, where a son promised to pay for necessaries, which had been advanced to his father, if he did not, such promise was held not binding; *Cook v. Bradley*, 7 Conn. R. 57; *Parker v. Carter et al.*, 4 Munf. R. 273; and the same was held of an agreement by a father, to pay for the expenses of the sickness of a son, who was of age, and away from home, made subsequently to their being incurred; *Mills v. Wyman*, 3 Pick. R. 207; and, of the same principle are, *Dodge v. Adams*, 19 Pick. R. 429; *Ridgway v. English*, 2 Zab. R. 416; and *Watkins v. Halstead*, 3 Sandf. Super. C. R. 311, which last, was a promise by a married woman made after her divorce from her husband, to pay for necessaries which had been furnished her during her coverture; all of which cases, as well as the following, prove that by the term "moral obligation," as applied legally, is meant, what the moralist would call a perfect moral obligation, that is, an obligation of justice, and not merely of benevolence and piety; *Jones v. Shorter et al.*, adm'rs, 1 Kelly's R. 294, *Farnham v. O'Brien*, 22 Maine R. 481; *Andover, &c., v. Gould*, 6 Mass. R. 43; *Davenport v. Mason*, 15 Id. 74; *Mercer v. Stark*, Walk. (Miss.) R. 451; *Tioga v. Seneca*, 13 Johns. R. 380; *Hatchell v. Odom*, 2 Dev. & Bat. L. R. 302; *McMorris v. Herndon*, 2 Bail. R. 56; *Hanley v. Farrar*, 1 Vt. R. 420. But other cases, indicate still more specifically, what is meant by the term 'moral obligation,' showing, that "it is not expressive of any vague and undefined claim, but of those imperative duties, which would be enforceable at law, were it not for some positive rule of law, legal maxim, or statute provision, which, with a view to general benefit, exempts the party in that particular instance, from legal liability. On such duties, so exempted, the express promise operates to revive the liability, and take away the exemption, because if it were not for the exemption, they would be enforced at law through the medium of an implied promise." One class of cases proving this, is that relative to bankrupts or insolvents, who, after obtaining a discharge, have promised their creditors to pay them in full; *Maxim v. Morse*, 8 Mass. R. 127; *Trumbull v. Tilton*, 1 Post. (N. H.) R. 129; *Graham v. Hunt*, 8 B. Mon. R. 8; *Shippey v. Henderson*, 14 Johns. R. 178; *Erwin v. Saunders et al.*, 1 Cow. R. 249; *Stafford v. Bacon*, 25 Wend. R. 384; *Depuy v. Stewart*, 3 Id. 135; *Kingston v. Wharton*, 2 Serg. & Raw. R. 208; *Earnest v. Parke*, 4 Raw. R. 452; *Field's Estate*, 2 Id. 351; *Lonsdale v. Brown*, 4 Wash. C. C. R. 150; *Dearing v. Moffitt*, 6 Alaba. R. 776; *Sconton v. Eislord*, 7 Johns. R. 36; *Brown et ux., v. Collins*,

the bankrupt, or by some person thereto lawfully authorized by him in writing; and by the last bankrupt act no such promise is now of any avail (*h*). So a simple contract debt, which would otherwise have been barred by the Statute of Limitations (*i*), from having been incurred

(*h*) Stat. 12 & 13 Vict. c. 106, s. 204.

(*i*) Stat. 21 Jac. I. c. 16, s. 3.

8 Hump. R. 511. Another class of cases has arisen from promises to pay debts barred by the statute of limitations, in which the promises were held valid; *Carson v. Clark*, 1 Scam. R. 114; *Head's exec. and exe'x, v. Manner's adm'r's*, 5 J. J. Marsh. R. 257; *Harrison v. Handley*, 1 Bibb's R. 443; *Gray v. Lawridge*, 2 Id. 285; *Bell v. Rowland's adm'r's*, Hard. R. 301; *Guy v. Tams*, 6 Gill's R. 85; *Bangs v. Hall*, 2 Pick. R. 368; *Davenport v. Mason*, 15 Mass. R. 74; *Dawes v. Shed et al., exec's*, 15 Id. 7; *Exeter Bk. v. Sullivan et al.*, 6 N. H. R. 135; *Kittredge v. Brown*, 9 Id. 377; *Walker v. Eastman*, 6 Id. 367; *Buswell v. Roby*, 3 Id. 467; *Stanton v. Stanton*, 2 Id. 425; *Atwood v. Coburn*, 4 N. H. R. 315; *Rice et al., v. Wilder et al.*, Id. 336; *Belton, adm'r, v. Cutts, adm'r*, 11 Id. 170; *Ridgway v. English*, 2 Zabr. R. 416; *Exec's of Conovers v. Conover et al.*, Sax. R. 404; *Saltur v. Saltur's adm'r*, 1 Halst. R. 405; *Danforth v. Culber*, 11 Johns. R. 146; *Sands v. Gelston*, 15 Id. 511; *Hatchell v. Odum*, 2 Dev. & Bat. L. R. 302; *Sherrod v. Bennett et al.*, 8 Ired. L. R. 309; *Peebles v. Mason*, 2 Dev. L. R. 367; *Smallwood v. Smallwood*, 2 Dev. & Bat. L. R. 330; *Rainey v. Link*, 3 Ired. L. R. 376; *Turner v. Chrisman*, 20 O. R. 332; *Hill v. Henry*, 17 Id. 9; *Jones et al., exec's, v. Moore, adm'r*, 5 Bin. R. 573; *Streeter v. Luter, adm'r*, Leg. Intellig., Apr. 7, 1854; *Eckert v. Wilson*, 12 Serg. & Raw. R. 393; *Fries v. Boiselet*, 9 Id. 128; *Early v. Rustenbaden*, 3 Barr's R. 418; *Haylebaker v. Reeves*, 2 Jones R. 264; *Forney v. Benedict*, 5 Barr's R. 225; *Gilkysen v. Larue*, 6 Wat. & Serg. R. 213; *Davis v. Steiner*, 2 Har. R. 275; *Harbold's exec's, v. Kuntz*, 4 Id. 210; *Huff v. Richardson*, 7 Id. 388; *Reynolds v. Johnson*, 9 Hump. R. 444; *Coles v. Kelsey*, 2 Tex. R. 541; *Burton v. Stevens*, 24 Vt. R. 131; 22 Id. 179; *Paddock v. Colby et al.*, 18 Vt. R. 485; *Clementson v. Williams*, 8 Cranch's R. 72; *Whetzell v. Bussard*, 11 Wheat. R. 309; *Bell v. Morrison*, 1 Pet. R. 351; *Lonsdale v. Brown*, 4 Wash. C. C. R. 150; *Raudon v. Toby*, 11 How. R. 493. Upon the same principle, promises, made by one after arriving at full age, to do what he agreed to do while a minor, have been held to be legally operative; *Bliss et al. v. Perryman*, 1 Scam. R. 484; *Taylor v. Rundell*, 2 Annual R. 367; *Merriam et al. v. Wilkins et al.*, 6 N. H. R. 432; *Wright v. Steele*, 2 Id. 51. And by analogy with the foregoing cases, if the consideration be still continuing, a subsequent promise will be valid; *Carrol v. Nixon*, 4 Wat. & Serg. R. 516; *Carman v. Noble*, 9 Barr's R. 366; *Nesmuth v. Drum*, 8 Wat. & Serg. R. 9; *Lonsdale v. Brown*, 4 Wash. C. C. R. 150; so, a promise to pay the principal of a debt, void by the usury laws, is binding; *Early v. Mahon*, 15 Johns. R. 147; and, this is also true of a promise made by an executor, relative to the debt of his testator; *Clark v. Herring*, 5 Bin. R. 33; so, too, where money has been twice paid, through failure to produce the receipt given on first payment, a subsequent promise to refund, will be binding; *Bentley v. Morse*, 14 Johns. R. 468. Another class of cases arises where a promise to pay, has been made by an endorser of a promissory note, who has knowledge of a want of due diligence in the holder in giving him notice; *Breed v. Hillhouse*, 7 Conn. R. 523; *Hopkins v. Liswell*, 12 Mass. R. 52; *Thornton v.*

upwards of six years, may be revived by a subsequent promise to pay, or even by an acknowledgment of the debt (*k*); but by a modern statute (*l*), such promise or acknowledgment must be made or contained by or in some writing, to be signed by the party chargeable thereby. And in like manner a debt incurred or contract made by a person during infancy, and voidable on that account, may be confirmed by an express promise or ratification made when of full age (*m*); although such a promise or ratification must now, by the statute just mentioned (*n*), be made by some writing signed by the party to be charged therewith.

By the ancient common law, every legal instrument in writing was a deed sealed and delivered (*o*); and in accordance with this circum-

(*k*) Bac. Abr. tit. Limitations of Actions (E).

(*l*) Stat. 9 Geo. IV. c. 14, s. 1, called Lord Tenterden's Act.

(*m*) Bac. Abr. tit. Infancy and Age (I) 8; *Williams v. Moor*, 11 Mee. & Wels. 256, 263; * *Harris v. Wall*, 1 Ex. Rep. 122.*

(*n*) Stat. 9 Geo. IV. c. 14, s. 5.

(*o*) See Principles of the Law of Real Property, 118, 2nd ed.; 123, 3rd ed.

Wynn, 12 Wheat. R. 183. The consideration of a moral obligation, which seems to have given rise to more embarrassment than any other, is, where a promise has been made to pay a debt, subsequently to a voluntary release of the debt by the creditor; some of the cases are in favour of the validity of such a promise; *Jamison v. Ludlow*, 3 Ann. (La.) R. 493; *Doty v. Wilson*, 14 Johns. R. 378; *Willing v. Peters*, 12 Serg. & Raw. R. 182; *McPherson's adm'rs, v. Reeves*, 2 Pa. R. 521; and others, against it; *Warren v. Whitney et al.*, 24 Maine R. 561; *Valentine v. Foster*, 1 Metcf. R. 520; *Snevily v. Read*, 1 Wat. R. 396; the law is probably, upon principle, with the former cases; for of the latter, *Valentine v. Foster*, was a promise made by a witness subsequent to a release, made in order to qualify him for giving testimony, and the court said that it would destroy all confidence in evidence given under such circumstances, if a subsequent promise by the witness, could revive his liability; and another, *Snevily v. Read*, was a case where a creditor had received satisfaction of his

debt, by taking the body of his debtor, whom he subsequently released from arrest, and the debtor afterwards promised to pay; which was held not sufficient to support an action, for the arrest had been a satisfaction of the prior debt, and consequently, the subsequent promise was without consideration. Where the act to be done, is one, which the party who subsequently promises, is legally, as well as morally, bound to perform, the promise will be supported, as a promise to maintain a bastard child, or, an agreement by an executor, to pay the funeral expenses of his testator; or by a husband, to pay for necessities advanced to a wife, who had become a charge upon a parish, and the same is true of like examples; *Hargrove et al., exec's., v. Freeman*, 12 Geo. R. 342; *Carson v. Clark*, 1 Scam. R. 114; *Inhabitants of Alna v. Plummer*, 4 Greenlf. R. 258; *Hanover v. Turner*, 14 Mass. R. 227; *Hapgood v. Houghton, exec.*, 10 Pick. R. 164; *Shenk v. Mingle*, 13 Serg. & Raw. R. 29.

stance, contracts are, as we have seen (*p*), now divided in law into two kinds only, namely, parol (that is verbal) or *simple* contracts, and *special* contracts made by deed. But as the art of writing became general, many parol contracts were, for greater certainty, put into writing, though not made by deed. And by some statutes of modern times, writing is required to most simple contracts respecting matters [*70] of importance. These statutes we shall now proceed to *notice, premising that in all cases where writing is by any statute made necessary to a contract, the contract is still a *parol*(1) one, though evidenced by the writing (*q*); but when a contract is made by deed, the *deed itself* is the contract (*r*). The first and most important statute then, by which writing is required to many agreements, is the Statute of Frauds (*s*), which enacts in its fourth section, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized(2). This enactment, it will be observed, does not give to writing any validity which it did not possess before. A written promise made since this statute, without any consideration, is quite as much *nudum pactum* as it would have been before (*t*). The statute

(*p*) Ante, p. 65.

(*q*) Sugd. Vend. & Pur. 125, 126.

(*r*) Dyer, 305 a; Byron v. Byron, Cro. Eliz. 472; 1 Wms. Saund, 274 a, n. (3).

(*s*) 29 Car. II. c. 3.

(*t*) See Williams on Executors, pt. 4, bk. 2, ch. 2, sect. 2; 1 Wms. Saund. 211, n. (2)

(1) The word PAROL is generally a cause of much confusion to students, particularly in its application to written contracts not under seal; a parol contract, legally defined, is a contract made either verbally or in writing not under seal, as distinguished from those which are under seal, bearing the name of deeds or specialties.

(2) The 4th section of the Statute of Frauds, 29 Car. II., c. 3, is in the following words: "And be it further enacted by the authority aforesaid, That from and after," &c., "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge

merely adds a further requisite to the validity of certain contracts, namely, that they shall, besides being good in other respects, be put into writing, otherwise no action shall be maintained upon them (*u*).

*A great number of cases have been decided upon the above section of this celebrated statute. One of the most important [*71]

(*u*) Agreements, where the matter thereof is of the value of 20*l.* or upwards, are, with some exceptions, liable to a stamp duty of 2*s.* 6*d.*, with a further progressive duty of the same amount for every *entire* quantity of 1080 words beyond the first 1080; stat. 13 & 14 Vict. c. 97.

the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The above section is in force in Florida, Georgia, Maine, Massachusetts, Maryland, New Jersey, Ohio, Vermont, and Virginia, by legislative adoption; and its provisions have been received and acknowledged by nearly all the other States. By the enactments of the legislatures of Alabama, Kentucky, Mississippi, and Tennessee, the words "or make any lease thereof, for a longer term than one year," have been inserted in place of "or any interest in or concerning them." In New Hampshire, the words "or any interest in or concerning them" are omitted. In Arkansas, the words "or to charge any person upon any lease of lands, tenements, or hereditaments, for a longer term than one year," follow the words "or any interest in or concerning them." In North Carolina and Texas there is an addition making the sale of

slaves invalid, unless by agreement in writing, and in the former State, the provisions respecting contracts in consideration of marriage, and those not to be performed within one year, are omitted, but in Texas these are retained, and it is also enacted that a parol lease for more than one year shall be invalid. "The Civil Code of Louisiana, art. 2415, without adopting in terms the Statute of Frauds, declares generally, that all verbal sales of immoveable property, or slaves shall be void." By an act of the legislature of Delaware, one person shall not be liable to answer for the debt of another of twenty-five dollars and upwards, unless the agreement is in writing,—nor shall one be liable to answer for another's debt of five dollars, and not exceeding twenty-five dollars, "unless such promise and assumption shall be proved by the oath or affirmation of one credible witness, or some memorandum or note in writing shall be signed by the party to be charged therewith." In Pennsylvania, the Statute of Frauds is not in force; Anon. 1 Dal. R. 1; and the only provisions on the subject are to be found in an act entitled "An act for prevention of frauds and perjuries," passed March the 21st, 1772, the first section of which, is similar to the first three sections of the Statute of Charles II.

The following are some of the more recent decisions on this subject; Blount *v.* Hawkins, 19 Alaba. R., 100; Turner *v.* Fenner et al., Id., 355; Brewer *v.* Brewer et al., Id., 482; Brainard *v.* McDevitt, 21 Id.,

is that of *Wain v. Warlters* (x), in which it was held that the statute, in requiring the *agreement* to be in writing, required that the *consideration*, which is part of the agreement, should be in writing, as well as the promise itself. And therefore a promise in writing to pay the debt of a third person, which did not state any consideration, was held to give no cause of action; and parol evidence of a consideration was not allowed to be given. This case has been followed by many other decisions to the same effect (y). If however the consideration for the promise, though not expressly stated, can be fairly gathered from the terms of the writing, that will be sufficient (z). The phrase in the statute to *answer for* the debt, default or miscarriage of another person, means to answer for a debt, default or miscarriage *for which that other remains liable* (a). Thus where one party to an agreement

(x) 5 East, 10; 2 Smith's Leading Cases, 147.

(y) *Saunders v. Wakefield*, 4 Barn. & Ald. 595; * *Morley v. Boothby*, 3 Bing. 107; * *Clancy v. Piggott*, 2 Ad. & Ell. 473; * 1 Smith's Leading Cases, 136; 1 Wms. Saund. 211, n. (d); *Price v. Richardson*, 15 Mee. & Wels. 539.*

(z) *Newbury v. Armstrong*, 6 Bing. 201; * *Shortreede v. Cheek*, 1 Ad. & Ell. 57.*

(a) 1 Wms. Saund. 211 b, n. (2); 1 Smith's Leading Cases, 134; *Green v. Cresswell*, 10 Ad. & Ell. 453; * S. C. 2 Per. & Dav. 430.

119; *Martin v. Black's exec.*, Id., 721; *District*, 14 Misso. R. 499; *Hart v. Rector*
Blakeney v. Ferguson et al., 3 Eng. R., et al., 13 Id., 497; *Halsa v. Halsa*, 8 Id.,
 260; *Allen et al. v. Jarvis*, 20 Conn. R., 303; *Pitcher v. Wilson*, 5 Id., 46; *Green-*
 38; *Marvin v. Foxon*, Id., 486; *Clark v. leaf et al. v. Burbank*, 13 N. H. R., 454;
Pendleton, Id., 495; *Eaton v. Whitaker*, 18 Sampson v. Burnside, Id., 265; *Drake v.*
 Id., 222; *Russell v. Slade et al.*, 12 Id., Newton, 3 Zab. R., 111; *Field et al. v.*
 455; *Downey v. Hotchkiss*, 2 Day's R., Runk, 2 Id., 525; *Clark v. Tucker et al.*,
 225; *Scotien v. Brown*, 4 Harring. R., 2 Sandf. Super. C. R., 157; *Wyman v.*
 324; *Dorman v. Bigelow, exec.*, 1 Florid. Smith, Id., 331, *Simms v. Kileian*, 12
 R., 281; *Cameron et al. v. Ward*, 8 Geo. Ired. L. R., 252; *Ledford v. Ferrell's*
 R., 245; *Hollingshead, admr., v. McKenzie,* admr., et al., Id., 285; *Reed v. Evans et*
 Id., 457; *Thornton v. Heirs of Henry*, 2 al., 17 O. R., 123; *Ewing v. Tees*, 1 Bin.
Scam. R., 219; *Murphy et al. v. Merry,* R. 450; *Wilson v. Clark*, 1 Wat. & Serg. R.
 8 Blackf. R. 295; *Shirley v. Shirley*, 7 Id., 554; *Boyer v. McCulloch*, 3 Id., 429; *Mil-*
 452; *Barickman v. Rhykendall*, 6 Id., 24; *ler v. Hower*, 2 Raw. R., 53; *Eckert v.*
Chandler et ux. v. Davidson, Id., 367; *Eckert*, 3 Pa. R., 332; *Eckert v. Mace,*
Johnston v. Glancy et al., 4 Id., 94; *Huckle-* Id., 364, n.; *Galbraith v. Galbraith*, 5 Wat.
man, admr., v. Miller et al., Id., 323; *Car-* R., 146; *Brawdy v. Brawdy*, 7 Barr's R.,
nutt v. Roberts, 11 B. Mon. R., 42; *Tuttle* 16; *Taylor v. Drake*, 4 Strobb. L. R., 431;
v. Swett et al., 31 Maine R., 555; *Preble v.* Compton v. Martin, 5 Rich. R. 14; *Elfe v.*
Baldwin, 6 Cush. R., 549; *Taney v. Bach-* Gadsden, 2 Id., 373; *Bowles v. Woodson,*
tell, 9 Gill's R., 205; *Weed et al. v. Terry,* 6 Gratt. R. 88; *Ware v. Stephenson*, 10
 2 Doug. R., 344; *Jones v. Palmer*, 1 Id., Leigh's R., 171; *Collins, admx., v. Row.,*
 379; *Gothard v. Flynn*, 25 Missi. R., 58; Id., 114.
Bailey et al. v. Trustees of Mineral School

verbally promised the other, that, in consideration of his discharging from custody a third person whom he had taken in execution for debt, he, the first party, would pay the debt, it was held that an action might well be brought on this promise, although it was not put in writing (*b*). For this was not a promise to answer for the debt of another person, to which that *other remained liable, but to [*72] pay a debt from which the other was discharged. It was an original promise to pay, and not a collateral promise to guarantee, which is the meaning in the statute of the words "answer for." The words "any agreement that is not to be performed within the space of one year from the making thereof," have been held to mean an agreement which appears from its terms incapable of performance within the year. Thus where one man promised another for one guinea, to give him a certain number on the day of his marriage, it was held that a writing was unnecessary, for the marriage might have happened within the year (*c*). So a contract by A. that his executor shall pay 10,000*l*. need not be in writing (*d*); for the death of A. and payment of the money may all take place within a twelvemonth. It has also been held that, in order to bring an agreement within this clause of the statute, so as to render writing necessary, both parts of the agreement must be such as are not to be performed within a year from the making thereof. Thus, where a landlord agreed to lay out 50*l*. in improvements, in consideration of the tenant undertaking to pay him 5*l*. a year during the remainder of his term (of which several years were unexpired), it was held that writing was unnecessary (*e*); for although the tenant's part of the agreement was not to be performed within a year, the landlord's part might reasonably have been so. These decisions have considerably narrowed the operation of the statute, and have left remaining much of the mischief arising from reliance on memory only, which it was the intention of the statute to obviate, by requiring written evidence (*f*). The last clause of the enactment has *however received a very liberal construction. The words [*73] are "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And it has been held that any insertion by the party of his name in any part of the

(*b*) *Goodman v. Chase*, 1 Barn. & Ald. 297. See also *Lane v. Burghart*, 1 Q. B. 933.*

(*c*) *Peter v. Compton*, Skin. 353; 1 Smith's Leading Cases, 142; *Souch v. Strawbridge*, 2 C. B. 808.*

(*d*) *Wells v. Horton*, 4 Bing. 40.*

(*e*) *Donnellan v. Reid*, 3 Barn. & Adol. 899; * *Cherry v. Heming*, 4 Ex. Rep. 631.*

(*f*) See 1 Smith's Leading Cases, 144 *et seq.*

agreement is a sufficient signing within the statute (*g*), provided the name be inserted in such a manner as to have the effect of authenticating the instrument (*h*); and it is not necessary that both parties should sign the agreement. The whole of the agreement must be contained in the writing, either expressly or by reference to some other document, but the writing is required by the statute to be signed only by the party to be charged (*i*). And 'as a "memorandum or note" of the agreement is allowed, a writing sufficient to satisfy the statute may often be made out from letters written by the party (*k*), or from a written offer, accepted, without any variation (*l*), before the party offering has exercised his right of retracting (*m*); and when correspondence is carried on by means of the post, an offer is held to be accepted from the moment that a letter accepting the offer is put into the post, although it may never reach its destination (*n*).

The seventeenth section of the Statute of Frauds, which relates to contracts for the sale of goods, wares and merchandize for the price of 10*l.* or upwards, has been already noticed (*o*) (1), together with the [*74] clause in the statute of Geo. IV., next noticed, called Lord Tenterden's Act, by which this enactment has been extended and explained (*p*).

The next statute which requires our notice is intituled "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements," and is commonly called Lord Tenterden's Act (*q*). By this statute no acknowledgment or promise by words only can take any case of simple contract out of the operation of the Statute of Limitations (*r*), or deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by

(*g*) *Ogilvie v. Foljambe*, 3 Meriv. 62.

(*h*) *Stokes v. Moor*, 1 Cox, 219; *Selby v. Selby*, 3 Meriv. 4, 6.

(*i*) *Laythoarp v. Bryant*, 2 Bing. N. C. 735, 742.* See Sugd. Vend. & Pur. c. 3, ss. 3, 4, p. 112 *et seq.*, 11th edit.

(*k*) *Owen v. Thomas*, 3 My. & Keen. 353.

(*l*) *Holland v. Eyre*, 2 Sim. & Stu. 194; *Gibbons v. North-Eastern Metropolitan Asylum District*, 11 Beav. 1.

(*m*) *Routledge v. Grant*, 4 Bing. 653; * S. C. 1 Moo. & Pay. 717.

(*n*) *Dunlop v. Higgins*, 1 H. of L. Cas. 381; *Duncan v. Topham*, 8 Q. B. 225.*

(*o*) Ante, p. 37.

(*p*) Stat. 9 Geo. IV. c. 14, s. 7; ante, p. 38.

(*q*) Stat. 9 Geo. IV. c. 14.

(*r*) Stat. 21 Jac. I. c. 16, s. 3.

(1) See ante p. 38, note (2).

or in some writing to be signed by the party chargeable thereby(s). The effect of such a promise has already been referred to(t). The statute makes no mention of any signature by an agent; such a signature therefore is not in this case sufficient(u). And no joint contractor is to lose the benefit of the Statute of Limitations by reason only of any written acknowledgment or promise made and signed by any other joint contractor; but nothing therein contained is to alter, or take away, or lessen the effect of any payment of any principal or interest made* by any person whatsoever(x). However, no endorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the *Statute of Limitations(y). The statute further enacts(z), as [75] has been already mentioned(a), that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. And it is further enacted(b), that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain *credit, money or goods upon*, unless such representation or assurance be made in writing signed by the party to be charged therewith. There appears to be some error in the word “*upon*” in this enactment, which, as it stands, is superfluous(c). And it has been doubted whether a representation made to a purchaser by the trustee of some property, that the property was encumbered to a less extent than was actually the case, was a representation concerning

(s) See *Lechmere v. Fletcher*, 1 Cro. & Mee. 623; * *Bird v. Gammon*, 3 Bing. N. C. 883; * *Cheslyn v. Dalby*, 4 You. & Coll. 238.

(t) Ante, p. 69.

(u) *Hyde v. Johnson*, 2 Bing. N. C. 776.

(x) Stat. 9 Geo. IV. c. 14, s. 1; *Wainman v. Kynman*, 1 Ex. Rep. 118; * *Cleave v. Jones*, 6 Ex. Rep. 573; * *Bamfield v. Tupper*, 7 Ex. Rep. 27.*

(y) Sect. 3.

(z) Sect. 5.

(a) Ante, p. 69.

(b) Sect. 6.

(c) See 1 Mee. & Wels. 104, 123.*

the *ability* of the vendor within the meaning of the statute (*d*). The better opinion seems to be that such a representation is within the statute, and ought consequently to be obtained in writing.

In addition to those contracts which by statute are required to be in writing, there exists a peculiar class of contracts, which in their nature are expressed in writing, and for which a consideration is presumed to have been *given till the contrary is proved (*e*). These [*76] are bills of exchange and promissory notes (*f*). A bill of exchange is a written order from one person to another to pay to a third person, or to his order, or to the bearer, a certain sum of money. The person making the order is called the drawer, the person on whom it is made the drawee, and the person to whom the money is payable the payee. The bill is sometimes made payable to the drawer himself, or to his order, or to him or bearer. If the person on whom the bill is drawn undertakes to pay it, he writes on it the word "accepted," with his signature, and is then called the acceptor. A promissory note or note of hand, as it is sometimes called, is a written promise from one person to pay to another, or to his order, or to bearer, a certain sum of money. The person making the promise is called the maker of the note. No negotiable or transferable bill or note can be lawfully drawn or made for any sum under 20s. (*g*) (1); and bills and notes

(*d*) See *Lyde v. Barnard*, 1 Mee. & Wels. 101; * *Swann v. Phillips*, 8 Ad. & Ell. 457.*

(*e*) See *Mills v. Barber*, 1 Mee. & Wells. 425.*

(*f*) See *Byles on Bills*, and *Bayley on Bills*.

(*g*) Stat. 48 Geo. III. c. 88, s. 2.

(1) Very few restrictions of this nature exist within the United States, and even in those States where provisions of this kind are in force, they have a view rather to obtaining a protest, or recovering damages, than to an absolute prohibition. Thus, in Alabama, "every bill of exchange, of the sum of \$20 and upwards, drawn in, or dated at, or from any place in" the State, may be protested for non-acceptance, or non-payment; *Clay's Alaba. Dig.* 381. In Maine, "if a bill of exchange be drawn, accepted or endorsed, * * for one hundred dollars or more, and payable in" the "State, at a place seventy-five miles distant from the place where drawn, the damages against the acceptor, drawer or endorser, over and above the contents of the bill and interest, shall be one per cent. on its amount;" *Revis. Stat. of Maine*, 510; and a similar provision exists in Massachusetts; *Revis. Stat. of Mass.* 303. By the laws of New Jersey, bills of exchange drawn within the State, upon any person within the State, for eight dollars or upwards, may be protested for non-acceptance or non-payment; *Stats. of N. J.* 798. But, two of the States, Massachusetts and South Carolina, prohibit the negotiating of notes under a certain sum, the first limiting them to five dollars, under a penalty of fifty dollars; and the latter to one dollar, under a penalty of ten dollars; the prohibition in South Carolina, being also extended to bills of exchange; *Revis. Stats. of Mass.* 303; *Stats. of S. C.*, vol. 6, p. 34.

under 5*l*. cannot be made payable to bearer on demand, and are subject to other stringent restrictions (*h*)(1). Bills and notes payable to

(*h*) Stat. 17 Geo. III. c. 30; 7 Geo. IV. c. 6, s. 4.

The only other enactments in the United States, having any reference to this point, are those designed to prevent the issuing of notes intended to perform the functions of currency, by others than corporations specially created by authority of law with this power. Thus, in Pennsylvania, by the 2nd sec. of the Act of March 22, 1817, "No incorporated body, public officer, association or partnership, or private individual, other than such as have been expressly incorporated or established for the purpose of banking, shall make, issue, re-issue or circulate any promissory note, ticket, or engagement of credit in the nature of a bank note, of any denomination or amount whatsoever, &c., *Purd. Dig.*, (Steward & Brightly, 1853,) p. 77, s. 48. Similar provisions are in operation in many of the other states; *N. Y. Revis. Stats.*, (1836,) Vol. 1, p. 708; *Revis. Stats. of Mass.*, (1836,) p. 318; *Stats. of Ohio*, (1841,) p. 129 to 141.

(1) In connection with the subject of negotiable or transferable bills or notes, the recent English case of *Bellamy et al. v. Majoribanks et als.* 7 *Exch. R.* 389, relative to crossed checks, may not be entirely devoid of interest. The plaintiffs in this case, "were trustees of a gentleman named Frank, * * * they had opened an account with the defendants, Messrs. Coutts & Co., for the purposes of the trust. A suit was pending in the Court of Chancery with reference to the trust, in which Mr. Triston acted as solicitor for the plaintiffs. The other parties to the suit were the next of kin of Mr. Frank, and a Mr. Geary acted as solicitor for them. In June, 1845, Mr. Geary brought to Mr. Triston a check upon Messrs. Coutts, written out by him, for 259*6l*. 17*s.*, to be signed by the plaintiffs. It was, when delivered to Mr. Triston, in the common form. Mr. Triston sent the check to the plaintiff, Mr. Bellamy, at

Brighton, who returned it signed, with the following addition in his own handwriting, namely, at the end of the body of the check, the words: "General unpaid costs account," and crossed as follows, "Bank of England, for account of Accountant-General." Mr. Triston then sent it to the other trustee, (the plaintiff, Mr. Foster,) to be signed by him, and having received it back, delivered it to Geary. In point of fact, the department of the Bank of England, in which the business of the Accountant-General is conducted, would not have received this check, it being the rule not to receive any, except one drawn on the Bank of England itself, and this rule is well known among the London bankers. Upon the day on which Geary received the check, he struck out the crossing made by Mr. Bellamy, by running a pen through it, leaving it, however, perfectly legible, and crossed the check a second time, with the name of Messrs. Gossling & Co., his own bankers, and paid it into their bank, to the credit of his own account. Upon the following day, the clerk of Messrs. Gossling presented it for payment at Messrs. Coutts & Co., who paid it, and charged it to the debit of the plaintiffs' account. The money was placed by Messrs. Gossling to the credit of Geary, in his own account with them. He never paid the money to the Accountant-General, and the plaintiffs were obliged to make it good. The following is a copy of the check, as produced at the trial."

<p>LONDON, MESSRS. COUTTS & Pay to Edward Bearer, two thou and ninety - six shillings, (General account.) £259<i>6l</i>: 17: 0.</p>	<p>Presented to Messrs. Gossling & Co. for payment</p>	<p>June 23, 1845. Co. Bryant Geary, or sand five hundred pounds, seventeen unpaid Costs Ac- THOS. C. BELLAMY. CHAS. J. FOSTER.</p>
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bearer on demand are also prohibited from being issued by bankers, except by the banks and under the restrictions mentioned in the act recently passed to regulate the issue of bank notes (*i*). Bills or notes payable to A. B. or order are transferable by a written order indorsed thereon by A. B. The mere signature by A. B. of his name on the back, followed by his delivery of the bill or note (*k*), is however sufficient for this purpose. This is called an indorsement in blank; and after such an indorsement, the bill or note, together with the right to [77] sue upon it, may be transferred *by mere delivery (*l*). Any holder of the bill may consequently, after such an indorsement enforce payment to himself. The indorsement may however be special, as "Pay C. D. or order, A. B." And in this case the bill or note, in order to become transferable, must be indorsed by C. D. But if a bill be once indorsed in blank, it will always be payable to the bearer by any of the parties thereto, although it may subsequently be specially

(*i*) Stat. 7 & 8 Vict. c. 32, ss. 10, 11.

(*k*) *Bromage v. Lloyd*, 1 Ex Rep. 32.*

(*l*) *Peacock v. Rhodes*, 2 Doug. 333.*

PARKE, B., "Where a check is crossed, bankers generally refuse to pay it to any one except a banker; and if they do pay it to a person not a banker, they consider that they do it at their peril, in the event of the party, to whom the payment was made, not being entitled to receive it. That the object is to secure the payment, not to any particular banker, but to a *banker*, in order that it may be easily traced, for whose use the money was received; and that it was not intended thereby, to at all restrict the negotiability or circulation of the check, but merely to compel the holder, to present it through a quarter of known respectability and credit." "We are strongly inclined to think that, on a full inquiry, the usage will turn out to be no more than this; and, considering the custom in this point of view, the crossing is a mere memorandum on the face of the check, and forms no part of the instrument itself, and in no way alters its effect. There can be no doubt that such an usage is highly beneficial to the public. These instruments are, in their essential character, payable to bearer, they are in many re-

spects treated as bank notes, * * * It is manifestly, therefore, a great safeguard and protection to the real owner, that there should exist the means of tracing and ascertaining for whose use the money paid on the check is received, and to whom the money actually goes; and the payment through a banker secures this object. * * * We think there is no legal objection to the custom, if thus limited, and understood, upon the ground of its being repugnant to the essential quality of a check, namely, its negotiability by delivery. There is no obligation upon any one to receive payment by a check, whether it be crossed or not crossed; but if a man receive a crossed check, he seems to us not indeed to incur the obligation of presenting it for payment through a banker, as a condition precedent, but he ought not to complain if the drawee does not pay without previous inquiry. There is really no restriction upon its negotiability; but it is, in our opinion, a reasonable and lawful practice and usage, in order to secure, as far as possible, payment of checks to honest and *bonâ fide* holders."

indorsed; but the special indorser will not be liable to the bearer without the indorsement of the person to whom he has specially indorsed it (*m*). A bill or note payable to bearer is transferable by mere delivery without any indorsement.

The effect of accepting a bill, or making a promissory note, is to render the acceptor or maker primarily liable to pay the same to the person entitled to require payment. The effect of drawing a bill is to make the drawer liable to payment, if the acceptor make default. But in order to charge the drawer of a foreign bill, it must, by the custom of merchants, be protested by a notary public (*n*). This protest is a declaration by him in due form that payment has been demanded and refused. A protest, however, is unnecessary for an inland bill or promissory note (*o*). The effect of indorsing a bill or note is to make the indorser also liable to payment, if the acceptor of the bill or maker of the note should make default. The indorsement operates as against the indorser as a new drawing of the bill by him (*p*). An indorsement however may be made without recourse to the indorser, or "sans recours," as it is *generally expressed, in which case [78] the indorser avoids all personal liability (*q*). The drawer of a bill, or the indorser of a bill or note, will, however, be discharged from all liability, unless the person requiring payment should, within a reasonable time, give him notice that the bill or note has not been paid, or, as it is termed, has been dishonoured, and give him to understand, either expressly or by implication, that he looks to him for payment (*r*). In consequence of a consideration being presumed to have been given for every bill or note till the contrary is shown, it follows, that if a bill or note should have been drawn, accepted, or indorsed without any consideration, or for a consideration which is illegal, a bonâ fide holder for valuable consideration, or any indorsee from him, may, nevertheless, enforce payment; for when he took the security he was entitled to rely on the legal presumption of a proper consideration having been given (*s*) (1). It is stated by Sir William

(*m*) *Smith v. Clarke*, 1 Peake, 295; *Walker v. McDonald*, 2 Ex. Rep. 527.*

(*n*) *Gale v. Walsh*, 5 T. Rep. 239.*

(*o*) *Windle v. Andrews*, 2 Barn. & Ald. 696.*

(*p*) *Penny v. Innes*, 1 Cro. Mee. & Rosc. 441.*

(*q*) *Byles on Bills*, 110.

(*r*) *Hartley v. Case*, 4 Barn. & Cress. 339; * *Byles on Bills*, 202 *et seq.*

(*s*) *Collins v. Martin*, 1 Bos. & Pull. 651; *Morris v. Lee*, *Bayley on Bills*, 500; *Robinson v. Reynolds*, 2 Q. B. 196; * *May v. Chapman*, 16 M. & W. 355.*

(1) In general accommodation paper as between others than the original parties to

Blackstone (*t*), "that every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration." This, however, appears to be a mistake. The law does not give this effect to bills of exchange and promissory notes in respect of the undertaking being evidenced by writing, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium

(*t*) 2 Black. Comm. 446.

it, is to be governed by the rules of negotiable instruments founded upon a valuable consideration; *Brown v. Fort*, 1 Mart. R. 34; *Harrod v. Lafarge*, 12 Id. 21; *Dorsey v. Their Creditors*, 7 New Series (La.), 12; *Church v. Barlow*, 9 Pick. R. 549; *Commercial Bank v. Cunningham*, 24 Id. 276; *Quinn v. Fuller*, 7 Metc. R. 225; *Perry v. Green*, 4 Harrison's R. 61; *Jackson v. Richards*, 2 Caines' R. 243; *Grandin v. Le Roy*, 3 Paige's R. 509; *Clopper's Adm'r v. The Union Bank*, 7 Har. & Johns. R. 103; *Lathrop v. Morris*, 5 Sandf. Super. C. R. 9; *Appleton v. Donaldson*, 3 Barr's R. 381; *Snyder v. Wilt*, 3 Har. R. 65; *Bank of Montgomery Co. v. Walker*, 9 Serg. & Raw. R. 229; *Aiken v. Cathcart*, 3 Richard. L. R. 133. And even where the holder of the paper, knowing that it has been given or accepted for the accommodation of the endorser or drawer, gives time to such endorser or drawer, the maker or acceptor is not thereby discharged; for, having put himself on the paper, as a principal debtor, he is not entitled to the privileges of a surety, as between himself and strangers; *Bank of Montgomery v. Walker*, 9 Serg. & Raw. R. 229, S. C. 12 Id. 382; *White v. Hopkins*, 3 Wat. & Serg. R. 99; *Lewis v. Hauchman*, 2 Barr's R. 416; *Foard v. Womack, use, &c.*, 2 Alaba. R. 368; *Tarver v. Nance*, 5 Id. 712; *French v. Bank of Columbia*, 4 Cranch's R. 153; *Parks et al., v. Ingram et al.*, 2 Fost. R. 281; *J. & T. Powell v. Waters*, 17 Johns. R. 176; *Murrah et al. v. Judah*, 6 Cow. R. 484; *Commercial Bank of Albany v. Hughes*, 17 Wend. R. 94. But see *Clopper's adm'r v. The Union Bank*, 7 Har. & Johns. R. 103; *Perry v. Green*, 4 Harrison's R. 61. But this proposition is subject to certain modifications, for—First, where a bill is drawn for the accommodation of the drawer, or indorser, he, for whose benefit it is drawn, is not entitled to notice of non-acceptance or non-payment; *Armstrong et al., v. Gray*, 1 Stew. R. 175; *Evans, adm'r, v. Norris et al.*, 1 Alab. R. 511; *Foard v. Womack, use, &c.*, 2 Id. 368; *Tarver v. Nance*, 5 Id. 712; *Shirley v. Fellows et al.*, 9 Porter's (Alab.) R. 300; *Holman v. Whiting*, 19 Alab. R. 704; *French v. The Bank of Columbia*, 4 Cranch's R. 153; *Gillespie et al. v. Cammack et al.*, 3 La. Aun. R. 248; *Clopper's adm'r v. The Union Bank*, 7 Har. & Johns. R. 103; *Hoffman v. Smith*, 1 Caines' R. 160; *Commercial Bank of Albany v. Hughes*, 17 Wend. R. 94; *Deny v. Palmer*, 5 Ired. L. R. 610; *Farmers' Bank v. Vannometer*, 4 Rand. R. 553; *Reid v. Morrison*, 2 Wat. & Serg. R. 406. Secondly, where one has paid value for an accommodation bill or note, he may recover upon it, even though he took it with the knowledge that it was drawn for the accommodation of one or more of the parties; *Townsley v. Sumrall*, 2 Pet. R. 183; *Lambest v. Sandford*, 2 Blackf. R. 137; *Eldridge v. Duncan*, 1 B. Mon. R. 102; *Reawick v. Williams*, 2 Md. R. 363; *Brown v. Mott*, 7 Johns. R. 361; *Murrah et al. v. Judah*, 6 Cow. R. 484; *Grant et al. v. Ellicott*, 7 Wend. R. 227; *Perry et al. v. Crammond et al.*, 1 Wash. Cir. Ct. R. 100; but this principle has been contradicted in *Brown v. Fort*, 1 Mart. R. 34; *Commercial Bank v. Cunningham*, 24 Pick. R. 276; and *Quinn v. Fuller*, 7 Metc. R. 225.

of such securities (*u*). On this ground the law allows these instruments to form an exception to the general rule, that a consideration must be shown for every agreement, although evidenced by writing.

*We now come to the second class of contracts, namely, [*79] special contracts, or contracts by deed. These contracts differ from mere simple contracts in the following important particular, that they of themselves import a consideration (*x*), whilst in simple contracts a consideration must be proved. For the law presumes that no man will put his seal to a deed without some good motive (*y*). And when an agreement is once embodied in a deed, such deed becomes itself the agreement, and not evidence merely, as is the case when a parol agreement is reduced to writing. On this principle it appears to be that, after a deed has been executed, any alteration, rasure or addition made in a material point, even by a stranger, will render the deed void; and any alteration made by the party to whom it is delivered, although in words not material, will also render it void (*z*)(1). It is true that by recent decisions (*a*) this doctrine has been extended

(*u*) 1 Fonbl. Eq. 343, 344.

(*x*) 1 Fonbl. Eq. 342.

(*y*) See Principles of the Law of Real Property, 113, 1st ed.; 118, 2d ed.; 123, 3d ed.

(*z*) Pigot's case, 11 Rep. 27 a.

(*a*) Davidson v. Cooper, 13 Mee. & Wels. 343, 352; * Mollett v. Wackerbarth, 5 C. B. 181.*

(1) The ancient English doctrine on the subject of erasures, alterations, or interlineations, undoubtedly was, that the slightest change in any instrument of writing, subsequently to its execution, avoided it, whether the alteration was made by a party, or by a stranger; and the court decided, upon view of the instrument, whether it should be received or rejected. In this country, the doctrine, that an alteration, when made by a stranger, vitiates the document, is not sanctioned. It is now the general opinion, that a material alteration in any instrument of writing will avoid it, if made by one of the parties to the contract, or, if it be unexplained, for then it is presumed, that it was made by the party having it in his custody; Steele's Lessee, v. Spencer et al., 1 Pet. R. 560; English et al. v. Brennenman, 5 Ark. R. 377; Shelton v. Deering, 10 B. Mon. R. 407; Letcher v. Bates, 6 J. J. Marsh. R. 525; Smith v. Crooker et al., 5 Mass. R. 538; Ford v. Ford, 17 Id. 418; Bowers v. Jewell, 2 N. H. R. 543; Vanauken v. Hornbeck, 2 Green's R. 179; Jackson v. Malin, 15 Johns. R. 293; Woodworth v. Bank of America, 19 Johns. R. 391; Vanhorne v. Dorrance, 2 Dal. R. 306; Henning v. Workheiser, 8 Barr's R. 518; Van Amringe v. Morton, 4 Whart. R. 382; Maise v. Garner, Mart. & Yerg. R. 383; Newell v. Mayberry, 3 Leigh's R. 250; Adams et al. v. Frye, 3 Metef. R. 103; Bk. of United States v. Russell et al., 3 Yates R. 391; Stephens v. Graham et al., 7 Serg. & Raw. R. 505; but an immaterial alteration will not vitiate, unless it be made by one of the parties to the instrument altered; Johnson v. Bank of the United States, 2 B. Mon. R. 310; Bank of Limestone v. Penick, 5 Mon. R. 29;

a mere written agreement. But although it is no doubt highly important that all legal instruments should be preserved in their integrity, it may perhaps be doubted whether the doctrine in question would ever have existed, had there been no other reason for it than

Wright *v.* Wright et al., 2 Halst. R. 175; Jackson *v.* Malin, 15 Johns. R. 293; Morris's Lessee, *v.* Vanderen, 1 Dal. R. 67; Herdman *v.* Bratten, 2 Harring. R. 396; Vanauken *v.* Hornbeck, 2 Green's R. 179; Moore *v.* Bickham et al., 4 Bin. R. 1.

In accordance with this general rule on the subject of material alterations, it has been held, that one who claims under an instrument, which appears on its face to be altered, is bound to explain the alteration; United States *v.* Linn et al., 1 How. (U. S.) R. 104; Newcomb *v.* Presbrey, 8 Metc. R. 406; Gellett *v.* Sweat, 1 Gilm. R. 475; Humphreys *v.* Guillou et al., 13 N. H. R. 385; Acker *v.* Ledyard, 8 Barb. Supr. C. R. 514; Barrington et al. *v.* The Bank of Washington, 14 Serg. & Raw. R. 405; Adams et al. *v.* Frye, 3 Metc. R. 103; and, that a substantial erasure, is presumed to be false or forged, and must be accounted for before the writing can be given in evidence; McMillen *v.* Beauchamp, 2 La. R. 290; Fletcher et al. *v.* Cavelier et al., 4 Id. 270; Slocumb et al. *v.* Watkins, 1 Rob. R. 214; Chelsey *v.* Frost, 1 N. H. R. 145; Hills *v.* Barnes et al., 11 Id. 395; Jackson *v.* Osborn, 2 Wend. R. 555; Heffelfinger *v.* Shutz et al., 16 Serg. & Raw. R. 46; Prevost *v.* Gratz et al., 1 Pet. C. C. R. 364; and also, that where one offering a deed, proves as part of his evidence, that the deed has been fraudulently altered by him, it will be rejected; Babb *v.* Clemson, 10 Serg. & Raw. R. 419. On the other hand, it has been decided, that where an instrument is altered against the interest of the party claiming under it, the law will not presume that the alteration was improperly made, but the jury must determine the matter from all the circumstances of the case; Bailey *v.* Taylor, 11 Conn. R. 531; Whitmer *v.* Frye, 10 Misso. R. 348; Farlee *v.* Farlee, 1 Zab. R. 280; Heffelfinger *v.* Shutz et al., 16 Serg. & Raw. R. 46. Nor is a party bound

to explain an alteration, when it does not appear on the face of the deed, but is alleged by the opposite party; United States *v.* Linn et al., 1 How. (U. S.) R. 104; so also, if there is no suspicion leading to the belief, that the alterations were made subsequent to the execution, it will be presumed that they were made before; Whitsell *v.* Womack, use, &c., 8 Alab. R. 482; Farlee *v.* Farlee, 1 Zab. R. 280; Cumberland Bank *v.* Hall, 1 Halst. R. 213; Sayre *v.* Reynolds et al., adm'r, 2 Southard's R. 737.

As regards immaterial alterations, it has been held, that where it is so trivial as not to affect in the slightest manner the meaning of the original instrument, it will not vitiate it, even though the alteration has been done by one of the parties; Nichols *v.* Johnson, 10 Conn. R. 192; Shelton *v.* Deering, 10 B. Mon. R. 407; Hunt *v.* Adams, 6 Mass. R. 519; Bowers *v.* Jewell, 2 N. H. R. 543; Morrill *v.* Otis, 12 Id. 466; Griffith *v.* Cox, Tenn. R. 210; Barrabine et al. *v.* Bradhears, 5 Mart. R. 190; Hale *v.* Russ, 1 Greenl. R. 334; Brown *v.* Pinkham, 18 Pick. R. 172; Knapp *v.* Maltby, 13 Wend. R. 587. When an immaterial alteration has been made by a stranger, it will not vitiate a deed; Lewis et al. *v.* Payne, 8 Cow. R. 71; Wright *v.* Wright et al., 2 Halst. R. 175; Jackson *v.* Malin, 15 Johns. R. 293, and other cases cited above; and even a substantial erasure, if proven to have been done by a third person, without the connivance of either of the parties, is not material; Solibellas *v.* Reeves, Curator, 3 La. R. 55; Farlee *v.* Farlee, 1 Zab. R. 280; Rees *v.* Overbaugh, 6 Cow. R. 746; Lewis et al. *v.* Payn, 8 Id. 71; Smith *v.* Dunham, 8 Pick. R. 246; Ford *v.* Ford, 17 Id. 418; Arrison *v.* Harmstead, 2 Barr's R. 191; Boyd *v.* McConnell, 10 Hump. R. 68.

The current of the decisions seems to show, that an erasure in a deed, does not make it *ipso facto* void; such an alteration

the duty of a person having the custody of the instrument, made for his benefit, to preserve it in its original state.

will not render an instrument invalid, unless it was done under circumstances which the law does not allow; *Speake et al. v. The United States*, 9 Cranch's R. 28; *Ravisies v. Allston*, 5 Alaba. R. 301; *Whitsell v. Womack*, use, &c., 8 Id. 482; *Gooch v. Bryant*, 1 Shep. R. 386; *Wickes's Lessee, v. Caulk*, 5 Har. & Johns. R. 36; *Stewart v. Preston*, 1 Florida R. 10. Whether an erasure has been made, or not, and if so, when it was made, and with what intention or motive, are questions for the determination of a jury; *Steele's Lessee, v. Spencer et al.*, 1 Pet. R. 560; *Gellett v. Sweat*, 1 Gilm. R. 475; *Bowers v. Jewell*, 2 N. H. R. 543; *Hills v. Barnes et al.*, 11 Id. 395; *Cumberland Bank v. Hall*, 1 Halst. R. 213; *Sayre v. Reynolds et al.*, adm'rs, 2 South. R. 737; *Jackson v. Osborn*, 2 Wend. R. 555; *Acker v. Ledyard*, 8 Barb. Supr. C. R. 514; *Heffelfinger v. Shutz et al.*, 16 Serg. & Raw. R. 46; *Hudson v. Reel*, 5 Barr's R. 279; *Vanhorn v. Dorrance*, 2 Dal. R. 306; *Marshall et al. v. Gougler*, 10 Serg. & Raw. R. 164; *Sigfried v. Swan*, 6 Id. 312; *Barrington et al. v. The Bank of Washington*, 14 Id. 405; *Stevens v. Martin*, 6 Harris's R. 101. Whether an erasure is material or immaterial, is a question for the opinion of the court; *Steele's Lessee, v. Spencer et al.*, 1 Pet. R. 560; *Hale v. Russ*, 1 Greenlf. R. 334; *Johnson v. The Bank of the United States*, 2 B. Mon. R. 310; *Brown v. Pinkham*, 18 Pick. R. 172; *Martendale v. Follett*, 1 N. H. R. 95; *Bowers v. Jewell*, 2 Id. 543; *Morril v. Otis*, 12 Id. 466; *Humphreys v. Guillou et al.*, 13 Id. 385; *Marshall v. Gougler*, 10 Serg. & Raw. R. 164.

Although a writing may have been altered after its execution, still, if subsequently to the alteration, it be ratified by all the parties, it will be binding; *Speake et al. v. The United States*, 9 Cranch's R. 28; *Hale v. Russ*, 1 Greenlf. R. 334; *Byers v. McClanahan*, 6 Gill & Johns. R.

250; *Johnson v. The Bank of the United States*, 2 B. Mon. R. 310; *Conwell v. Dandridge's adm'r*, 8 Dana's R. 272; *Bank of Limestone v. Penick*, 5 Mon. R. 29; *Smith v. Crooker et al.*, 5 Mass. R. 538; *Humphreys v. Guillou et al.*, 13 N. H. R. 385; *Hills v. Barnes et al.*, 11 Id. 395; *Camden Bank v. Hall et al.*, 2 Green's R. 583; *Woolley et al. v. Constant*, 4 Johns. R. 54; *Penny v. Corwithe*, 18 Id. 499; *Barrington et al. v. The Bank of Washington*, 14 Serg. & Raw. R. 405.

A distinction has been drawn between deeds, or instruments under seal, and grants of estates lying merely in grant, or bills or notes, as respects loss of evidence of title, arising from erasures; thus, it has been held, that if a deed of conveyance be altered, the title to the land conveyed thereby, is not affected, but merely the evidence of that title, and the covenants of the deed; *Barrett v. Thorndike*, 1 Greenlf. R. 73; *Wallace v. Harmstead*, 3 Har. R. 462; *Withers v. Atkinson*, 1 Wat. R. 236; *Babb v. Clemson*, 10 Serg. & Raw. R. 419; and, "that where the subject matter of the deed lies in grant, so that the estate created, cannot exist without the deed, because it is of the essence of the estate, any alteration in the deed, material or immaterial, by the party claiming the estate, avoids the deed as to him, to all intents and purposes, so that not only all remedy by action, but the estate itself, is gone;" *Lewis et al. v. Payn*, 8 Cow. R. 7. As regards deeds of conveyance of land, there can be no question, that a fraudulent alteration, or even a voluntary destruction, by a party, will not destroy his title, but merely vitiates his evidence, and destroys the covenants of the deed; *Barrett v. Thorndike*, 1 Greenlf. R. 73; *Jackson v. Chase*, 2 Johns. R. 87; *Lewis et al. v. Payn*, 8 Cow. R. 7; *Jackson v. Gould*, 7 Wend. R. 364; *Withers v. Atkinson*, 1 Watts' R. 236; *Wallace v. Harmstead*, 3 Harris' R. 462; *Graysons v. Richards*,

Having now spoken of the promise, whether express or implied, which is necessary to a contract, and also of the consideration, whether express or implied, by which such promise is sustained, let us consider some important *objects* for which a contract may be made, and which [*80] seem to require a special mention. The object for which *a contract is made may be either lawful or unlawful; and if it

10 Leigh's R. 57; Babb v. Clemson, 10 Serg. & Raw. R. 419.

If a note be altered by the promisee, its validity is destroyed, and as the evidence of title to the note is gone, so is the remedy, and no other evidence can be resorted to for the purpose of maintaining an action: Martendale v. Follett, 1 N. H. R. 95; Blade v. Noland, 12 Wend. R. 173. In Wallace v. Harmstead, 3 Harris, R. 462, Gibson, C. J., says, "The doctrine of deeds, stands on the principles of the common law; the doctrine of commercial instruments, stands on the principles of the law merchant * * * fraudulent alteration of either, avoids it between the original parties; but the necessities of trade, require, that a *bona fide* holder of a bill or note, be not involved in the consequences of their dealings. On the other hand, the assignee of a bond, whether legal or equitable, is subject to defalcation, and the equities of the obligor."

There is yet another topic to be noticed in connection with this subject, and that is, in relation to bonds or notes in blank, or drawn with blanks. It seems to be admitted, as respects notes, that where one writes his name upon a piece of paper, or draws a note with blanks, and gives the paper or writing to another, who draws a note, or fills up the blanks, it is valid, upon the principle of implied consent; English et al. v. Breneman, 4 Eng. R. 122; S. C. 5 Id. 377; Bank of Limestone v. Penick, 5 Mon. R. 29; Bank of St. Clairsville v. Smith, 5 O. R. 222; in this last case, a note was drawn with a blank sum, though there was a verbal stipulation, that it should not be filled to a greater amount than \$200; it was, however, filled for \$700, yet the note was held good. On the subject of bonds, the cases are wholly

irreconcilable; the following holding, that where one affixes his signature and seal to a piece of paper, and authorizes it to be filed, it will be binding; Boardman v. Goret, 1 Stew. R. 517; Wiley et al. v. Moore et al., 17 Serg. & Raw. R. 438; Bank of South Carolina v. Hammond, 1 Richard L. R. 281; Gourdin v. Commander et al., 6 Id. 497; the contrary being maintained in Byers v. McClanahan, 6 Gill. & Johns. R. 250; Ayers v. Harnes, 1 O. R. 372; Horry District v. Harrison, 1 N. & McC. R. 554; Boyd v. Boyd, 2 Id. 125; Duncan v. Hodges, 4 McC. R. 239; Perminter v. McDaniel, 1 Hill's R. 267; Stoney v. McNeill, Harp. 156; Gilbert v. Anthony, 1 Yerg. R. 69. The same diversity of opinion exists in relation to bonds executed with blanks; some of the cases holding them to be valid, as, Smith v. Crooker et al., 5 Mass. R. 538; Ex parte Decker, 6 Cow. R. 59; Ex parte Kerwin, 8 Id. 118; Commercial Bank of Buffalo v. Kortwright, 22 Wend. R. 348; Vanhook v. Barnett et al., 4 Dev. L. R. 272; Whiting v. Daniel et al., 1 Hen. & Munf. R. 390; Duncan v. Hodges, 4 McC. R. 239; and others deciding that they have no validity; Graham, adm'r, v. Holt, 3 Ired. L. R. 300; Davenport v. Sleight, 2 Dev. & Bat. L. R. 381; McKee v. Hicks, 2 Dev. L. R. 379; Harrison v. Tiernans, 4 Rand. R. 177. In regard to letters of attorney, for commercial, banking, and ordinary business purposes, the necessities of trade have led to the adoption of such instruments with blanks, to a very large extent. The great convenience of their employment, together with their almost universal use for some purposes, *e. g.*, the transfer of stocks and loans, will probably induce the courts to recognize their validity.

be unlawful the contract will be void, and the illegality may be pleaded as a defence to an action brought upon such a contract (b). A distinction was formerly taken between contracts whose object was merely prohibited by the law under some given penalty, and those whose object was morally wrong. The former were termed *mala prohibita*, the latter *mala in se* (c); and it was considered that, as the former involved no moral turpitude, a man might embrace either of the alternatives offered by the law, and either abstain from the offence and remain harmless, or commit it and suffer the penalty. This distinction however has long been exploded (d); for it is considered to be equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state (1). Whether, therefore,

(b) *Collins v. Blantern*, 2 Wils. 341, 347; *S. C.* 1 *Smith's Leading Cases*, 154; *Paxton v. Popham*, 9 East, 408; *Pole v. Harrobin*, 9 East, 416, n.; *De Begnis v. Armistead*, 10 Bing. 107; * *S. C.* 3 *Moo. & Scott*, 516.*

(c) See 1 *Black. Com.* 54, 57.

(d) *Aubert v. Maze*, 2 Bos. & Pul. 374, 375; *Cannan v. Brice*, 3 B. & Ald. 183; * *Bensley v. Bignold*, 5 Barn. & Ald. 335, 341; * *Cope v. Rowlands*, 2 Mee. & Wels. 149 157; * *Fergusson v. Norman*, 5 Bing. N. C. 76, 84.*

(1) There is probably no principle of law better settled, than that every contract must have a legal consideration; *Pounds v. Richards et al.*, 21 *Alaba. R.* 424; *Marey v. Crawford*, 16 *Conn. R.* 552; *Coolidge v. Blake*, 15 *Mass. R.* 430; *Wheeler v. Russell*, 17 *Id.* 258; *Wilson et al., exes's, v. The Baptist Education Soc. of the State of N. Y.*, 10 *Barb. Supr. C. R.* 308; and it is immaterial whether the illegality of the consideration consists in its being prohibited by statute, or in its being contrary to good morals, or against public policy; whether it be *malum prohibitum* or *malum in se*; for under either aspect the contract is equally void. The leading case on this subject is, *Armstrong v. Toller*, 11 *Wheat. R.* 258, *S. C.*, *Toller v. Armstrong*, 4 *Wash. C. C. R.* 297, in which *Marshall, C. J.*, says, "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled, than that no action can be maintained on a contract, the consideration

of which is either immoral in itself, or prohibited by law."

In like manner, if the original consideration of a contract is in any respect unlawful, any subsequent agreement founded upon it, and by which it is to be carried into effect, is likewise unlawful; but if the subsequent agreement can be entirely separated from the former illegality, it is valid; *Walker v. The Bank of Washington*, 3 *How. R.* 62; *Warren v. Crabtree*, 1 *Greenlf. R.* 167; *Smith et al. v. Barstow*, 2 *Doug. R.* 153; *Early v. Mahon*, 19 *Johns. R.* 147; *Bell v. Quin*, 2 *Sandf. Supe. C. R.* 146; *Columbia Bridge Co. v. Kline*, *Bright R.* 320; and so too, if the consideration is part lawful, and part unlawful, the good shall stand, and the bad only be avoided, unless it be of such a nature that the good and bad cannot be separated, in which case the whole contract will be void; *Nicholson v. Fearson et al.*, 7 *Pet. R.* 103; *Moncure et al. v. Dermott*, 13 *Id.* 345; *Whitsell v. Womack, use, &c.*, 8 *Alaba. R.* 466; *Pond v. Smith et al.*, 4

the object of a contract be unlawful because morally wrong, or unlawful by the policy of the common law, or unlawful because a penalty is

Conn. R. 297; *Terry et al. v. Olcott*, Id. 442; *Gardner v. Mazey*, 9 B. Mon. R. 90; *Irvine v. Stone et al.*, 6 Cush. R. 508; *Hinds v. Chamberlain*, 6 N. H. R. 225; *Carleton v. Whitcher*, 5 Id. 196; *Roby v. West*, 4 Id. 285; *Crawford v. Merrell*, 8 Johns. R. 253; *Township of Nottingham v. Giles*, 1 Pa. R. 120; *Vroom v. Exec's of Smith*, 2 Green's R. 479; *Hook v. Gray*, 6 Barb. Supr. C. R. 398; *Brown v. Tappan*, 9 Wend. R. 175; *Hamilton v. Canfield*, 2 Hall's R. 526; *Van Alstyne v. Wimple*, 5 Cow. R. 162; *Frazier v. Thompson*, 2 Wat. & Serg. R. 235; *Yundt v. Roberts*, 5 Serg. & Raw. R. 138; *Filson's Trustees v. Himes*, 5 Barr's R. 452, *Thomas v. Brady*, 10 Id. 170.

A distinction is to be noted on this subject between contracts executory, and those executed; in the former case the contract will not be enforced, by reason of the unlawful consideration or promise, and in the latter case the courts will not grant relief, but will suffer the *status* of the parties to remain, and particularly so, where the application is made by the party who has been guilty of the unlawful act; *Adams v. Barrett*, 5 Geo. R. 508; *Musson et al. v. Fales et als.*, 16 Mass. R. 334; *Ball v. Gilbert*, 12 Metcf. R. 397; *Skinner v. Henderson*, 10 Misso. R. 205; *Kneeland v. Rogers et al.*, 2 Hall's R. 579.

But a contract which has been made in a foreign country, and is in accordance with the laws of the place where it was made, may be carried into effect in this country, although contrary to our laws; unless it was entered into with the intention of being perfected here, in fraud of our statutes; or unless its enforcement would result in injury to our citizens, or afford a pernicious example; *Greenwood v. Curtis*, 6 Mass. R. 358; *Thompson v. Ketchum*, 8 Johns. R. 189; *Hicks v. Brown*, 12 Id. 142; *Sconelle v. Canfield*, 14 Id. 338; *Lodge v. Phelps*, 1 Johns. Cas. 139; *Rug-*

gles v. Keeler, 3 Johns. R. 263; *Emory v. Greenough*, 3 Dal. R. 370 n; *Adams v. Gay*, 19 Vt. R. 358.

Where a statute contains a provision for the performance of a certain thing, other ways of accomplishing that thing are not necessarily void; if, indeed, the statute expressly says that the act shall be done in the manner pointed out, and not otherwise, then all other means are unlawful, but, if it only directs, and does not enjoin, the matter may be accomplished in any other way, provided it be not contrary to the principles of the common law, or to good morals or public policy; *Whitsell v. Womack, use, &c.*, 8 Alaba. R. 466; *Lugg v. Burgess et al.*, 2 Stew. R. 509; *Bates et al. v. The Bank of the State of Alabama*, 2 Alaba. R. 487; *Post-Master General v. Early*, 12 Wheat. R. 136; *Smith v. The United States*, 5 Pet. R. 293; *Farrar et al. v. The United States*, Id. 273; *Justices of Christian v. Smith et al.*, 2 J. J. Marsh R. 474; *Fant et al. v. Wilson*, 3 Mon. R. 343; *McCormick v. Young*, 3 J. J. Marsh. R. 180; *Baker v. Haley et al.*, 5 Greenf. R. 240; *Kavanagh v. Saunders et al.*, 8 Id. 422; *Purple v. Purple et al.*, 5 Pick. R. 226; *Vroom v. Exec's of Smith*, 2 Green's R. 479; *Ellis v. Robinson*, 2 Pa. R. 707; *Howard v. Blackford*, Id. 777; *Day v. Hale*, 7 Halst. R. 204; *Woolwich v. Forrest et al.*, 1 Pa. R. 115; *Township of Middletown v. McCormick et al.*, 2 Id. 200; *Doll v. Bull et al.*, 2 Johns. Cas. 239; *Cloasen v. Shaw*, 5 Wat. R. 468; *Farmers' Bk. in Reading v. Boyer*, 16 Serg. & Raw. R. 4; *Anderson v. Foster*, 2 Bail. R. 501; *Hooe v. Tebbs et al.*, 1 Munf. R. 501.

And even where an act is expressly prohibited by the laws, it does not follow that every contract which may be tainted with the illegal matter is absolutely void, but it depends in each case upon a sound construction of the statute prohibiting it. Take, for instance, the subject of usury,

attached to it by any particular statute, in every case the contract is void; and it is indifferent, under such circumstances, whether the

which is generally, throughout the Union, forbidden by statutory enactment, yet usurious contracts are not usually held absolutely void, but the decisions on the subject are as various as the statutes, and in every case it depends upon the construction of the statute whether the contract shall be void, or only void *pro tanto*. In a word, if the law does not avoid the instrument or contract, on account of such illegality, it will be valid for the legal, and void only for the illegal part of it; *De Wolf v. Johnson et al.*, 10 Wheat. R. 367; *Flecknor v. The U. S. Bank*, 8 Id. 338; *Higginson et al. v. Gray et al.*, 6 Metef. R. 212; *Bank of Washington v. Arthur et als.*, 3 Gratt. R. 173. Thus in Massachusetts and Michigan, three times the usurious interest is to be deducted from the claim, which will then be good for the balance; *Upham v. Brimhall*, 11 Metef. R. 526; *Brigham v. Moreau*, 7 Pick. R. 40; *Parker v. Biglow*, 14 Id. 436; *Sumner v. Williams*, 1 Metef. R. 398; *King v. Howard*, 1 Cush. R. 137; *Orr v. Lacey*, 2 Doug. R. 230; in Pennsylvania, Iowa, Kentucky, Maine, Vermont, New York, Tennessee, Ohio and Missouri, the interest over and above that which is allowed by law, only, is forfeited, and an action may be brought for principal and lawful interest; *Wycoff v. Loughead*, 2 Dal. R. 92; *Turner v. Calvert*, 12 Serg. & Raw. R. 46; *Shenck v. Wright*, 1 Iowa R. 128; *Berry v. Walker*, 9 B. Mon. R. 467; *Larabee v. Lambert*, 32 Maine R. 97; *Elworth v. Mitchell*, 31 Id. 249; *White v. The Franklin Bank*, 22 Pick. R. 181; *Wheaton v. Hibbard*, 20 Johns. R. 293; *Hawkins v. Welch*, 8 Misso. R. 490; *The State of Ohio for the use, &c., v. Taylor et als.*, 10 O. R. 378; *Busby v. Finn*, 1 O. R. N. S. 410; *Isler v. Brunson*, 6 Hump. R. 277; *Boyers v. Boddie*, 3 Id. 666; *Weatherhed v. Boyers*, 7 Yerg. R. 545; *Turney v. The State Bank*, 5 Hump. R. 407, 410; *Stevens v.*

Fisher, 23 Vt. R. 272; *Burton v. Blin*, 23 Id. 151; *Nichols et al. v. Bliss*, 22 Id. 581; but in Pennsylvania, if any portion of the usurious interest has been received, the whole thing loaned is forfeited as a penalty, and may be recovered in a *qui tam* action; *Philip v. Kirkpatrick*, Addis. R. 124; *Exec's of Pawling v. Adm'rs of Pawling*, 4 Yeat. R. 220; *Large v. Passmore et al.*, 5 Serg. & Raw. R. 51; *Evans v. Negley*, 13 Id. 218; *Agnew v. McElhare*, 6 Har. R. 484; and in Florida, Indiana, Louisiana, Mississippi and South Carolina, the whole interest is forfeited, and the principal only can be recovered; *Mitchell v. Doggett*, 1 Fla. R. 356; *Billingsley v. The State Bank of Indiana*, 3 Port. R. 377; *Lalande v. Breaux et al.*, 5 Ann. R. 505; *Richards v. Freesler*, 2 Id. 265; *Haynes v. Cobb*, Id. 364; *McLaurin v. Parker et al.*, 24 Missi. R. 511; *Quarles v. Brannon*, 5 Strobb. L. R. 151. The principle, seems to be, in accordance with what is above stated, that if the contract be part good and part bad, the good shall prevail, and the bad be avoided, if they can be separated; and the statute points out what is good, and what bad, or determines, that under certain circumstances, the contract is to be considered entire, and that therefore the good and bad cannot be separated, but the whole contract is void. If the basis of a subsisting contract is usurious, no subsequent agreement founded upon, and inseparable from, the former contract, will be free from the taint of usury; *Jones v. Jackson*, 14 Alaba. R. 186; *Botsford v. Sandford*, 2 Conn. R. 276; *Gibson v. Stearns*, 3 N. H. R. 185; *Tuthill v. Davis*, 20 Johns. R. 284; *Bridge v. Hubbard*, 15 Mass. R. 96; *Moter v. Dorsett*, 1 McCord's R. 350; *Clark v. Badgely*, 3 Halst. R. 233; but, if a subsisting contract is good and legal, it cannot be destroyed by a subsequent agreement as to usurious interest; *Stebbins v. Smith*, 4 Pick. R. 97;

contract be made by deed, or by parol merely. Thus if a bond under seal be given by a man to a woman in order to induce her to cohabit

Swartwout v. Payne, 19 Johns. R. 294; Johnson v. Johnson, 11 Mass. R. 359; Hughes v. Wheeler, 8 Cow. R. 77; Rice v. Welling et al., 5 Wend. R. 595; Hammond v. Hopping, 13 Id. 505; Mitchell v. Cotten, exec., 2 Fla. R. 149; Troutman v. Barnett et al., 9 Geo. R. 30; Exec's of Williams v. Williams, 1 Harrison's R. 255; Edgell v. Stanford, 6 Vt. R. 551; and it is not usury to purchase a note, bond, or other security for money, at any rate of discount, as there is not a contract of loan, for usury is the taking of interest at an illegal rate upon a loan; but it must be a *bona fide* transaction, and the note or bill must not have been used or made as a mere device to avoid the statutes of usury; Saltmarsh v. P. & M. Bank of Mobile, 17 Alaba. R. 761, S. C., 14 Id. 668; Brown v. Harrison et al., 17 Id. 774; Gregory v. Bewley et al., 2 Eng. R. 22, S. C. 5 Ark. R. 318; Caton v. Shaw, 2 Har. & Gill's R. 13; Belden v. Lamb, 17 Conn. R. 441; Freeman v. Brittin, 2 Harrison's R. 191; Brame v. Hess, 13 Johns. R. 52; Mann v. The President & Directors of the Comm. Company, 15 Id. 44; Powell v. Waters, 17 Id. 176; Cobb v. Titus, 13 Barb. Supr. C. R. 47; Seymour et als. v. Maroin et al., 11 Id. 80; Simpson v. Fullenwidder, 12 Ired. L. R. 334; Musgrove v. Gibbs, 1 Dal. R. 216; Parker v. Cousins, 2 Gratt. R. 372; so, too, to determine whether or not a loan is usurious, reference must be had to the law of the place where it was made; Jacks et als. v. Nichols, 5 Barb. Supr. C. R. 38; Sherrill v. Hopkins, 1 Cow. R. 103; Smith v. Mead, 3 Conn. R. 253; De Wolf v. Johnson, 10 Wheat. R. 367.

For a further and full consideration of the subject of contracts void because unlawful, see the following cases:

As to contracts void on account of infringing some statutory provision or enactment; Hannay v. Eve, 3 Cranch's R., 242;

Patton v. Nicholson, 3 Wheat. R., 207; The Julia, Luce, Master, 8 Cranch's R., 181; The Aurora, Pike, Master, Id., 263; The Hiram, Barker, Master, Id., 444, S. C., 1 Wheat. R., 440; The Ariadne, 2 Wheat. R., 143; Craig et al. v. The State of Missouri, 4 Pet. R., 411; Fales et al. v. Mayberry, 2 Gallis. R., 563; Exec's of Cambioso v. The Assignees of Maffet, a Bankrupt, 2 Wash. C. C. R., 103; Kennett et al. v. Chambers, 14 How. R., 39; Harris v. Runnels, 12 Id., 80; Munsell v. Temple, 3 Gilm. R., 93; Wheeler v. Russell, 17 Mass. R., 257; Springfield Bank v. Merrick, 14 Id., 322; Hunt v. Knickerbocker, 5 Johns. R. 327; Mitchell v. Smith, 1 Bin. R., 110; Fowler et al. v. Throckmorton, 6 Blackf. R., 326; Steele v. Curle, 4 Dana's R., 384; Dickerson v. Gordy, 5 Rob. R., 420; Rand v. Tobie, 32 Maine R., 420; Merrick v. The Trustees of the Bank of the Metropolis, 8 Gill's R., 73; Richardson et al. v. The Marine, Fire and Insurance Co., 6 Mass. R., 111; Wickham v. Conklin, 8 Johns. R., 220; The Bank of Michigan v. Niles, 1 Doug. R., 411; Maybin v. Coulon, 4 Dal. R., 298; Duncanson v. McClure, Id., 308; Nichols v. Ruggles, 3 Day's R., 145; Pratt v. Adams, 7 Paige's R., 615; Odineal v. Barry, exec., et al., 24 Missi. R., 9; Merrell v. Legrand, 1 How. (Missi.) R., 150; Callagan v. Hallett, 1 Caines' R., 104; Ludlow et al. v. Van Rensselaer, 1 Johns. R., 94; Goodale v. Holridge, 2 Id., 193; Walt v. Harper, Id., 386; Love v. Palmer, 7 Id., 159; Richmond v. Roberts, Id., 319; Read v. Pruyn et al., Id., 426; Strong v. Tompkins et al., 8 Id., 98; Yeomans v. Chatterton, 9 Id., 295; Bruce v. Lee et al., 4 Id., 410; Graves et als. v. Worrall et al., 14 Id., 146; Griswold et al. v. Waddington et al., 15 Id., 57, S. C., 16 Id., 438; Seamen v. Waddington, 16 Id., 510; Biddis, adm'r, v. James, 6 Bin. R., 321; Eberman v. Reitzel, 1 Wat. & Serg.

with him, it is void for the immorality of its object (*e*). But a bond given to a woman in respect of the injury *she has sustained [^{*81}] by past cohabitation is valid (*f*). For in this case the object is not immoral; and the consideration implied by the bond being a deed under seal, supplies the want which would otherwise exist of a proper

(*e*) *Walker v. Perkins*, 1 Wm. Black. 517; *S. C.* 3 Burr. 1568; *Gray v. Mathias*, 5 Ves. 286.

(*f*) *Turner v. Vaughan*, 2 Wils. 339; *Hill v. Spencer*, 2 Amb. 611; *Gray v. Mathias*, 5 Ves. 286; *Hall v. Palmer*, 3 Hare, 532; *Kyne v. Moore*, 1 Sim. & Stu. 61; 2 Sim. & Stu. 260; *Inge v. Moseley*, 6 Barn. & Cress. 133; * 2 Sim. 161.

R., 181; *Fox v. Mensch*, 3 Id., 446; *Kepner v. Keefer*, 6 Wat. R., 231; *Yerger v. Rains*, 4 Humph. R., 259, 267; *Ohio Life and Insurance Trust Company v. The Merchants' Insurance and Trust Company*, 11 Id., 1; *Heirs of Hunt v. Heirs of Robinson*, 1 Tex. R., 758; *Elkins v. Parkhurst*, 17 Vt. R., 105; *Spalding v. Preston*, 21 Id., 9; *Territt et al. v. Bartlett*, Id., 184; *Case v. Riker*, 10 Id., 482.

As to contracts void on account of being contrary to good morals, or because against public policy or principles of the common law, see as well some of the above cases, as the following: *Greenwood v. Exec's of Colcock*, 2 Bay's R., 67; *Denton v. Erwin et al.*, 6 (La.) Ann. R., 317; *Denton v. Wilcox*, 2 Id., 66; *Slidell v. Pritchard et al.*, 5 Rob. R., 101; *De Sobry v. De Laistre*, 2 Har. & Johns. R., 228; *Commonwealth v. Harrington*, 3 Pick. R., 26; *Columbia Bank v. Haldeman*, 7 Wat. & Serg. R. 235; *Pulse v. State*, 5 Hump. R., 108; *Hale v. Henderson*, 4 Id., 199; *Allen v. Dodd*, Id., 132; *Logan v. Austin*, 1 Stew. R., 478; *Grant et al. v. McLester*, 8 Geo. R., 553; *Haralson v. Dicking*, 2 Car. L. Repos., 66; *The First Congregational Church of the City of New Orleans v. Henderson*, 4 Rob. R., 209; *Shaw v. Reed*, 30 Maine R., 105; *Denny v. Lincoln*, adm'r, 5 Mass. R., 387; *Churchill v. Perkins et al.*, Id., 541; *Parsons v. Winslow*, 6 Id., 169; *Boynton v. Hubbard*, 7 Id., 112; *Swett et al. v. Poor et al.*, 11 Id., 549; *Ayer v. Hutchinson*, 4 Mass. R., 370; *Belding v. Pitkin*, 2 Caines' R., 149; *Thurston v. Percival*, 1 Pick. R., 415; *Shelton v. Homer et al.*, 5 Metcf. R., 462; *Worcester v. Eaton*, 11 Mass. R., 368; *Doughty v. Owen*, 24 Missi. R., 407; *Plummer v. Smith*, 5 N. H. R., 553; *Sayles v. Sayles*, 1 Fost. R., 312; *Sterling v. Simmickson*, 2 South. R., 756; *Fanshor v. Stout*, 1 Id., 312; *Sharp et al. v. Teese*, 4 Halst. R. 352; *Gulick et al. v. Ward et al.*, 5 Id., 87; *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. R., 194; *Wilbur v. How*, 8 Id., 444; *Thompson v. Davies*, 13 Id., 112; *Smith et al. v. Applegate*, 3 Zab. R., 352; *Whitaker v. Cone*, 1 Johns. Cas. 58; *Sherman v. Boyce*, 15 Johns. R., 443; *Tuxbury v. Miller*, 19 Id., 311; *Hatch v. Mann*, 15 Wend. R., 44; *Preston v. Bacon*, 4 Conn. R., 471; *Shattuck v. Woods*, 1 Pick. R., 175; *Bassier v. Pray*, 7 Serg. & Raw. R. 417; *Carrol v. Tyler*, 2 Har. & G. R., 54; *Smith v. Smith*, 1 Bail R., 70; *Harris v. Ross' exec's*, 10 Barb. Supre. C. R., 489; *Hartzfield v. Garden*, 7 Wat. R., 152; *Chippenger v. Hopbaugh*, 5 Wat. & Serg. R. 315; *Pingry v. Washburn*, 1 Aik. R., 264; *Cameron v. McFarland*, 2 Car. L. Repos., 415; *Stout v. Wren*, 1 Hawk's R., 420; *Oberman v. Clemmons*, 2 Dev. & Bat. L. R., 185; *Barbee v. Armstead et al.*, 10 Ired. L. R., 530; *Roll v. Raguet*, 4 O. R., 418; *Coulon v. Morton et al.*, exec's, 4 Yeat. R., 24; *Shenck v. Mingle*, 13 Serg. & Raw. R., 29; *Lidenbender v. Charles's adm'r*, 4 Id., 151; *Crook v. Williams*, 8 Har. R. 344; *Corley v. Williams*, 1 Bail. R. 588; *Vincent v. Groom*, 1 Yerg. R. 430.

consideration (*g*). If a contract have more than one object, and some of the objects are lawful, whilst the others are unlawful, the unlawful objects will not vitiate the others (*h*), provided the good part be separable from, and not depend upon, that which is bad (*i*); unless of course the whole contract should be rendered void by any enactment to the effect that all instruments containing any matter contrary thereto shall be void, in which case everything connected with the instrument will be vitiated (*k*) (1). And if the good part of a contract be inseparable from the bad, as if a contract be made partly in consideration of the payment of money (which would be good), and partly for a consideration whose object is illegal, the illegal part of the consideration will vitiate the good, and render the whole contract void (*l*).

[*82] *The instance above given of a bond for future cohabitation is an example of a contract void on account of its object being *malum in se*, or morally wrong. In the same manner, no action can be maintained on any contract for the sale or publication of any libellous or immoral book or print (*m*.) A striking instance of a contract void on account of its object being contrary to the policy of the common law, occurs in the case of a contract in restraint of trade. It is for the advantage of the community that every person should be allowed the full exercise of his trade or profession; and any contract whereby a person is attempted to be restrained from following his usual calling, even for a limited time, is therefore absolutely

(*g*) *Binnington v. Wallis*, 4 Barn. & Ald. 650, 952; * *ante*, p. 66.

(*h*) *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 East, 440; in all which decisions, unlawful covenants to pay the property tax were held not to vitiate other valid covenants in the same instrument. See also *Kerrison v. Cole*, 8 East, 231; *Mallan v. May*, 11 Mee. & Wels. 653; * *Green v. Price*, 13 Mee. & Wels. 695; * *affirmed* 16 Mee. & W. 346; * *Nicholls v. Streeton*, 10 Q. B. 346.*

(*i*) See *Biddell v. Leeder*, 1 Barn. & Cress. 327; * *decided* on the old Ship Registry Act.

(*k*) See 1 *Smith's Leading Cases*, 169, and the statutes recited in the preamble to 5 & 6 Will. IV. c. 41.

(*l*) *Fetherston v. Hutchinson*, Cro. Eliz. 199; *Bridge v. Cage*, Cro. Jac. 103. See also per *Tindal, C. J.*, in *Waite v. Jones*, 1 Bing. N. C.* 662; *Hopkins v. Prescott*, 4 C. B. 578.*

(*m*) *Fores v. Johnes*, 4 Esp. 97; *Stockdale v. Onwhyn*, 5 Barn. & Cress. 173; * *S. C.* 7 Dow. & Ry. 625; *Lawrence v. Smith*, Jac. 471.

(1) See *ante*, p. 80, note (1).

void (*n*). (1) But a contract is not rendered void by having for its object the restraint of a person from trading in a particular place (*o*), or within a reasonable distance from any particular place (*p*), for he may carry on his trade elsewhere; nor is a contract void which restrains a person from serving a particular class of customers (*q*) (for there are plenty of others to be found), or which binds a person to be the servant for life in his trade to another (*r*), for this is not in restraint of trade when it is to be carried on for his life. In a* [*83] recent case (*s*) a person agreed that he would become assistant to a dentist for four years, and that after the expiration of that term he would not carry on the business of a dentist in London, or any of the towns or places in England or Scotland where the dentist might have been practising before the expiration of the service. And it was held that the covenant not to practice in London was valid; but that the stipulation as to the other towns and places in England or Scotland was void. And according to the rule above mentioned (*t*), that where some of the objects of a contract are lawful and others unlawful, the unlawful objects will not vitiate the others, it was held

(*n*) Year Book, P. 2 Hen. V. pl. 26; Ward v. Byrne, 5 Mee. & Wels. 548; * Hind v. Gray, 1 Man. & Gran. 195.*

(*o*) Hitchcock v. Coker, 6 Ad. & Ell. 438; * S. C. 1 Nev. & P. 796; * Archer v. Marsh, 6 Ad. & Ell. 959; * S. C. 2 Nev. & P. 562; Leighton v. Wales, 3 Mee. & Wels. 545.*

(*p*) Davis v. Mason, 5 T. Rep. 118; * Proctor v. Sergeant, 2 Man. & Gr. 20; * S. C. 2 Scott, N. R. 289; Whittaker v. Howe, 3 Beav. 383; Pemberton v. Vaughan, 10 Q. B. 87; * Atkyns v. Kinnier, 4 Ex. Rep. 776; * Elves v. Cofts, 10 C. B. 241.*

(*q*) Rannie v. Irvine, 7 Man. & Gr. 969.*

(*r*) Wallis v. Day, 2 Mee. & Wels. 273.*

(*s*) Mallan v. May, 11 Mee. & Wels. 653.* See also Green v. Price, 13 Mee. & Wels. 695,* affirmed, 16 Mee. & Wels. 346; * Nicholls v. Stretton, 10 Q. B. 346.

(*t*) Ante, p. 81.*

(1) A contract in restraint of trade is only held to be void, when such an agreement is against public policy; if, therefore, the stipulations of the contract are such as to occasion no serious detriment to the interest of the public, the agreement will be binding; as, for example, a covenant, made by one not to carry on a trade in a specified locality, if based upon a consideration otherwise legal, is valid, because it is not considered of disadvantage to the public generally, particularly where the other party to the contract, as is usually the case, is qualified to conduct the business. For a full consideration of this point, see the following cases, which are believed to be all the American decisions on the question; Pierce v. Fuller, 8 Mass. R. 223; Palmer et al. v. Stebbins, 3 Pick. R. 188; Chappell v. Brockway, 21 Wend. R. 158; Ross v. Sadybeer, Id. 166; Bowser et al. v. Bliss et al., 7 Blackf. R. 345; Perkins v. Lyman, 9 Mass. R. 522; Stearns v. Barrett, 1 Pick. R. 443; Lawrence et al. v. Kidder et al., 10 Barb. Supr. C. R. 611; Mott, adm'r, v. Mott, 11 Id. 127.

that the stipulation as to practising in London was not affected by the illegality of the remainder of the agreement.

The cases in which contracts may be void in consequence of their contravening some acts of parliament are too numerous to be here specified. As an instance may be mentioned contracts by clergymen holding benefices with cure of souls, made for the purpose of charging such benefices with any sum of money; which contracts are rendered void by a statute of Elizabeth (*u*). And in these cases it has been held that any personal covenant for the payment of the money charged, is not invalidated by being contained in the same deed as the attempted charge on the benefice (*x*). Contracts for the sale or transfer of stock, of which the person contracting is not possessed at the time, and of which no transfer is intended to be made, are void by the Stock [84] Jobbing *Act (*y*) (1); and money lent for the purpose of settling losses which have arisen from such illegal contracts cannot be

(*u*) Stat. 13 Eliz. c. 20. See *Show v. Pritchard*, 10 Barn. & Cress. 241; * *Long v. Storie*, 3 De Gex & Smale, 308.

(*x*) *Monys v. Leake*, 8 T. Rep. 411; *Sloane v. Packman*, 11 Mee. & Wels. 770.*

(*y*) Stat. 7 Geo. II. c. 8, s. 8. See post, the chapter on Stock.

(1) This subject does not seem to have been considered of sufficient importance in several of the United States, to require statutory regulation. In Pennsylvania, however, by the 6th sec. of an Act of the Legislature of May 22, 1841, it is provided, that "If any person or persons whatsoever shall make or enter into any contract or agreement, written or oral, for the purchase, receipt, sale, delivery or transfer of any public loan or stock, or the stock of any corporation, institution or company, or other security in the nature thereof, or of any share or interest in any such loan or stock, or in the stock of any such corporation, institution or company, or other security in the nature thereof, or any bill, notes or other obligations, of any corporation, institution or company, created or authorized, or that may be hereafter created or authorized as aforesaid, in which contract or agreement it may be stipulated or understood between the parties thereunto, his, her, or their agent or agents, that the same may be executed or performed at any future period exceeding five judicial days next ensuing the date of such contract or agreement; then, and in every such case, such contract or agreement shall be, and the same is hereby declared to be null and void," &c.; *Purd. Dig.* (1853,) p. 105.

And in New York, it is enacted, that "all contracts, written or verbal, for the sale or transfer of any certificate, or other evidence of debt due, by or from the United States, or any separate State, or of any share or interest in the stock of any bank, or of any company incorporated under any law, of the United States, or of any individual State, shall be absolutely void, unless the party contracting to sell or transfer the same, shall, at the time of making such contract, be in actual possession of the certificate or other evidence of such debt, share or interest, or be otherwise entitled in his own right, or be duly authorized by some person so entitled, to sell or transfer the said certificate or other evidence of debt, share or interest so contracted for;" *Revis. Stats. of N. Y.*, Vol. I., p. 892.

recovered back (*z*). Securities for money won at play or any game, or by betting on any game, or for money lent for gaming or betting at the time and place of such play, were declared by a statute of Anne to be utterly void (*a*) (1); but by a later statute (*b*) such securities are not to be utterly void, but are to be taken to have been given for an illegal consideration; they are consequently now void only as between the parties, but valid in the hands of any innocent holder, to whom they may have been transferred without notice of the illegality of the transaction in which they originated (*c*). And by a more recent statute (*d*) it is enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in

(*z*) *Canaan v. Bryce*, 3 Barn. & Ald. 179.*

(*a*) Stat. 9 Anne, c. 14.

(*b*) 5 & 6 Will. IV. c. 41.

(*c*) See ante, p. 78.

(*d*) Stat. 8 & 9 Vict. c. 109, s. 18.

(1) Statutes against gaming, exist in almost all the States in the Union; and even in those States where all betting or gaming has not been prohibited by statute, the judiciary have decided, that where it is of an immoral tendency, or detrimental to public policy, it is unlawful; *Bevil, &c., v. Hix*, 12 B. Mon. R. 142; *Hickerson v. Benson et al.*, 8 Misso. R. 8; *Sisk v. Evans*, Id. 52; *Porter v. Sawyer*, 1 Harring. R. 517; in this last case, the Chief Justice remarks, "as a general proposition, it is lawful to bet. Contracts of this kind may be entered into, and the obligations arising from such contracts, must be enforced by courts and juries, if they be not such as to affect the good of society, corrupt public morals, or infringe upon the private rights or feelings of third persons." Thus, a bet on the age of a lady, or the sex of a person, or the issue of a general election, whilst pending, "would undoubtedly, be illegal, as being against public policy, and hurtful to society." For a further consideration of the statutes against gaming, and the construction placed upon them by the courts

of the several States, see the following cases; *Finn et al. v. Barclay et al.*, 15 Alaba. R. 627; *Manning v. Manning*, 8 Id. 138; *Givens v. Rodgers*, 11 Id. 543; *Stone v. Mitchell*, 2 Eng. R. 91; *Abrams et al. v. Camp*, 3 Scam. R. 290; *Parsons v. The State*, 2 Port. (Ind.) R. 499; *Danforth v. Evans*, 16 Vt. R. 538; *Mureau v. Langley et al.*, 21 Maine R. 26; *Bevil, &c., v. Hix*, 12 B. Mon. R. 142; *McKinney v. Pope's adm'r*, 3 Id. 93; *Lytle v. Lindsay*, Id. 125; *Ellis v. Beale*, 18 Maine R. 337; *Doyle v. The Commissioners of Baltimore County*, 12 Gill. & Johns. R. 484; *Amory v. Gilman*, 2 Mass. R. 1; *White v. Buss*, 3 Cush. R. 448; *Williams v. Woodman*, 8 Pick. R. 78; *Terrall v. Adams*, 23 Missi. R. 570; *Rush v. Gott*, 9 Cow. R. 173; *Brown v. Riker*, 4 Johns. R. 438; *Collins v. Ragrew*, 15 Id. 5; *Slate v. Black et al.*, 9 Ired. L. R. 378; *Bledsoe v. Thompson*, 6 Richard. R. 44; *Rice v. Gist*, 1 Strobh. L. R. 82; *Russell v. Pyland*, 2 Hump. R. 131; *Swaggerty v. Stokely*, 1 Swan's R. 38; *Tarleton v. Baker*, 18 Vt. R. 9; *Watson v. Fletcher*, 7 Gratt. R. 19; *Machir v. Moore*, 2 Id. 257.

any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. But this enactment is not to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise. Contracts for the payment of money, whereby there should be reserved more than five per cent. interest, were in like manner declared void by a statute of Anne, called the Usury Law (*e*); but in order to protect innocent holders of securities given for usurious consideration, it was [*85] subsequently declared that such contracts should not be *absolutely void, but should be considered to have been made for an illegal consideration (*f*). However, by a recent statute of the reign of King William the fourth (*g*), it is provided that no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall be void by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating or transferring the same. And by a more recent statute (*h*), which has been continued to the 1st of January, 1856 (*i*), all bills of exchange and promissory notes made payable at or within twelve months after the date thereof, or not having more than twelve months to run, and all contracts for the loan or forbearance of money above the sum of 10*l.* sterling, are exempted from the operation of the Usury Law (1). Nothing, however, contained in the last-mentioned

(*e*) Stat. 12 Anne, st. 2, ch. 16.

(*f*) Stat. 5 & 6 Will. IV. c. 41. See *Vallance v. Siddel*, 6 Ad. & Ell. 932.*

(*g*) Stat. 3 & 4 Will. IV. c. 98, s. 7. This statute is not repealed by stat. 2 & 3 Vict. c. 37, but is still in force. *Nixon v. Phillips*, 7 Ex. Rep. 188; * *Clark v. Sainsbury*, U. P. 18 Law Times, 187.

(*h*) 2 & 3 Vict. c. 37. See 1 Wms. Saund, 295 c, n. (1).

(*i*) Stat. 13 & 14 Vict. c. 56.

(1) The rate of interest established by law in the several States, is as follows: In Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Ohio, Indiana, Illinois, Missouri, and Arkansas, six per cent. per annum; in New York, South Carolina, Michigan, and Wisconsin, seven per cent.; in Georgia, Alabama, Mississippi, and Florida, eight per cent.; and in Louisiana, five per cent. per annum. It does not, however, necessarily follow, that every contract, by which a greater rate of interest is reserved, than what is allowed by law, is usurious, for in some States, more than the amount of interest specified in the statute, may be

act is to extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein.

The above enactments are perhaps the most important statutory provisions by which contracts may be vitiated. Contracts whose objects are lawful are endlessly diversified, and many of them are regulated by laws which it is not within the scope of the present work to enumerate. For the breach of any such contract pecuniary damages are, as we have seen (*k*), the sovereign remedy prescribed by law; though equity not unfrequently administers more appropriate specifics. The person to whom money *has become due, whether from any injury received, or from any contract broken, or from a contract to pay money itself, stands in a situation more or less advantageous as regards his remedies for recovering the money, according to the nature of the *debt* which has thus become due to him. For by the law of England all creditors are not allowed equal rights, but are preferred the one to the other, partly according to accidental circumstances, and partly according to the degree of diligence and precaution which each may have used. The subject of debt is of sufficient importance to form a separate chapter. [*86]

(*k*) Ante, p. 58.

taken by a bona fide agreement between the parties, as in Mississippi, Louisiana, Indiana, Missouri and Arkansas, ten per cent. per annum may be reserved and taken, if it be agreed upon between the parties; and in Wisconsin, twelve per cent. per annum by a like arrangement. A distinction also is to be noticed between an agreement to take usurious interest, and the actual taking thereof; in some States, while the former is void, only for the usurious interest agreed upon, and the agreement good for the principal and legal interest, the latter, (the actual taking of the usurious interest,) forfeits the whole sum, principal and interest, upon which the usurious interest has been paid; in every case, therefore, in which a question of usury is raised, it will depend upon a sound construction of the statutes of usury of the State where the contract was made, whether the contract shall be subjected to the penalties or forfeitures therein provided; these penalties or forfeitures are different in different States: thus, in Maine, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania and Delaware, when the statutes of usury have been violated, the whole debt is forfeited; in Massachusetts, New Hampshire, Georgia, and Wisconsin, there is a forfeiture of three times the excess of interest above what is allowed by law; in North Carolina, Maryland, Georgia, Tennessee, Ohio, and Arkansas, the contract upon which usurious interest is reserved, is void; in Virginia, North Carolina, and Indiana, the statute asks for a penalty, equal in amount to double the rate of interest asked above what is lawful; and in South Carolina, Alabama, Missouri, and Florida, all but the principal is forfeited. For further on the subject of usury, see ante, p. 80, note (1).

[*87]

CHAPTER III.

OF DEBTS

DEBTS, by the law of England, are divided into different classes, conferring on the creditor different degrees of security for re-payment. The class which confers the highest privileges is that of debts of record, which class will accordingly first claim our attention.

A debt of record is a debt due by the evidence of a court of record (*a*). Every court, by having power given to it to fine and imprison, is thereby made a court of record (*b*). Such courts are either supreme, superior or inferior. The supreme court is the Parliament. The superior courts of record are the House of Lords, the Court of Chancery, and the Courts of Queen's Bench, Common Pleas and Exchequer, which are the more principal courts. The Courts of the Counties Palatine of Lancaster and Durham are also superior courts of record (*c*). The Court of Bankruptcy and its district courts, and every commissioner thereof also exercise and enjoy all the powers and privileges of a court of record, as fully as the courts of law at Westminster (*d*). The Court for the Relief of Insolvent Debtors appears to be an inferior court of record (*e*). But this court and the courts of Bankruptcy have a jurisdiction limited to the special objects for which they were constituted. The inferior courts of record may therefore now be said, generally, to consist of the numerous courts established [*88] *throughout the country, under the recent acts for the more easy recovery of small debts and demands in England (*f*).

Debts of record do not, however, confer the same advantages on all creditors equally, for there is one creditor whose claims are paramount to all others, namely, the crown, provided the debt be a debt of record, or a debt by specialty, that is, secured by deed (*g*). And if the debt

(*a*) 2 Black. Com. 465.

(*b*) Bac. Abr. tit. Courts (D) 2.

(*c*) Ibid. (D) 1.

(*d*) Stat. 12 & 13 Vict. c. 106, s. 6.

(*e*) Stat. 1 & 2 Vict. c. 110, s. 27.

(*f*) Stats. 9 & 10 Vict. c. 95, s. 3; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54.

(*g*) Williams on Executors, pt. 3, bk. 2, ch. 2, s. 1.

be by simple contract without such security, it will have preference over the other simple contract creditors of the debtor, and, as some say, even over other creditors by specialty (*h*). The lien of the crown on the lands of its debtors by record or specialty, and also on the lands of accountants to the crown, is mentioned in the author's Treatise on the Principles of the Law of Real Property (*i*).

Of all debts which one subject may owe to another, that which confers the most important remedy is a *judgment debt*, or a debt which is due by the *judgment* of a court of record. As such a debt is due by the evidence of a court of record, it is of course a debt of record. Such a debt may however now be incurred, without any actual exercise of judgment on the part of the court. For, strange as it may appear, a judgment against a defendant in an adverse suit, though the most obvious, is yet not the most usual method of incurring a judgment debt. Such a debt may be incurred by the voluntary default of the defendant in making no reply to the action, which is called *nihil dicit*, or by his failing to instruct his attorney, whose statement of that circumstance is called *non sum informatus*, or by a *cognovit *actionem*, or [*89] more shortly *cognovit*, by which the defendant confesses the action, and suffers judgment to be at once entered up against him (*k*). Of late years also it has become very usual for the parties to a suit to obtain by consent a judge's order, authorizing the plaintiff to enter up judgment against the defendant, or to issue execution against him, either at once and unconditionally, or more usually at a future time, conditionally, on the non-payment of whatever amount may be agreed on. A judgment obtained on a judge's order for immediate judgment and execution is however the same thing as a judgment by *nihil dicit*, or confession (*l*). The most frequent method of incurring a judgment debt is not however attended with the actual commencement of any adverse action. A *warrant of attorney* is given by the intended debtor, which consists of an authority from him to certain attorneys to appear for him in court, and to receive a declaration in an action of debt for the amount of the intended judgment debt, at the suit of the intended creditor, and thereupon to confess the action, or suffer judgment to go by default, and to permit judgment to be forthwith

(*h*) Bac. Abr. tit. Executors (L.) 2.

(*i*) Page 62, 1st ed. ; 65, 2nd ed. ; 70, 3d ed.

(*k*) 3 Black. Com. 397 ; Stephen on Pleading, 120.

(*l*) Bell v. Bidgood, 8 C. B. 763 ; * Andrews v. Diggs, 4 Ex. Rep. 827.*

entered up against the intended debtor for the amount, besides costs of suit (1). Such a warrant of attorney is generally executed as a

(1) In New York, judgments on warrants of attorney, may be entered within a year and a day of the date of the warrant, as a matter of course; after that time, and within ten years, an order of the court, or of a judge at chambers, must be obtained; between ten and twenty years after date, judgment can only be entered by order of court; and after twenty years, the order will not be made, unless a rule to show cause is first had, and notice given to the opposite party, if within the reach of service; Manufacturers and Mechanics' Bank of the Northern Liberties in the County of Philadelphia, *v. Cowden et als.*, 3 Hill's R. 461; and sometimes, the court will refuse to allow a judgment to be entered on a bond and warrant, less than twenty years old, upon the presumption of payment; *Exec's of Clark, v. Hopkins*, 7 Johns. R. 556: upon a similar principle, a rule of the Supreme Court of Pennsylvania provides, that, "If a warrant to enter judgment be above ten years old, and less than twenty, application must be made to a judge for leave to enter judgment, founded on an affidavit of the due execution of the warrant, and that the money is unpaid, and the defendant living. If the warrant of attorney be above twenty years old, a rule to show cause must be obtained, of which, notice must be given, if the defendant be within the State of Pennsylvania."

There can be but one judgment entered on a warrant of attorney to confess judgment; *Campbell v. Kent*, 3 Penn. R. 72; but the second judgment is not void, though clearly irregular; *Neff et al. v. Burr*, 14 Serg. & Raw. R. 166; *Ulrich*, with notice, &c., *v. Voneida*, 1 Penna. R. 245; *Campbell v. Canon*, Addis. R. 267; *Adams v. Bush*, 2 Wat. R. 289; *Fairchild v. Camac*, 3 Wash. C. C. R. 558; and, therefore, where two or more are jointly and severally bound, and judgment be entered against one on warrant, he cannot be joined with the

others in a second judgment against all the defendants; *Manufacturers and Mechanics' Bk. of the Northern Liberties in the Co. of Philada. v. Cowden et als.*, 3 Hill's R. 461; *Averill v. Loucks*, 6 Barb. Supr. C. R. 19.

By agreement between the parties, a judgment on warrant may cover future advances of money; *Chapin v. Clemitson*, 1 Barb. Supr. C. R. 311; *Averill v. Loucks*, 6 Id. 19; *Monell v. Smith et al.*, 5 Cow. R. 441; *Bank of Auburn v. Throop*, 18 Johns. R. 505; *Roosevelt v. Mark et al.*, 6 Johns. Ch. R. 279; *Brinkerhoff et als. v. Marvin et als.*, 5 Id. 324; *Austin et al. v. McInlay*, 16 Johns. R. 165; *Holden et al. v. Bull*, 1 Penna. R. 460; *Parmentier v. Gillespie*, 9 Barr's R. 87. *Averill v. Loucks*, 6 Barb. Supr. C. R. 19; *Troup v. Wood*, 4 Johns. Ch. R. 247; *St. Andrews' Ch. v. Tompkins*, 7 Id. 14; and such an agreement ought to be as precise as a bill of particulars, and must be strictly followed; *Lawless v. Hackett*, 16 Johns. R. 149; *Chapin v. Clemitson*, 1 Barb. Supr. C. R. 311; *Nelson v. Sharp*, 4 Hill's R. 584; *Nichols v. Hewit*, 4 Johns. R. 433.

The court will not set aside a judgment entered on a warrant of attorney, merely on account of irregularity; *King v. Shaw*, 3 Johns. R. 142; *McFarland v. Irwin*, 8 Id. 77; *Haner's Appeal*, 5 Wat. & Serg. R. 473; *Lewis v. Smith*, 2 Serg. & Raw. R. 142; *Humphreys v. Rawn*, 8 Wat. R. 78; but if a warrant of attorney, made under or by reason of the provisions of a certain statute, does not strictly follow it, the judgment will be void, and so if the warrant has been obtained for an unlawful purpose, or upon an unlawful consideration; *Exparte Butler et als. v. Lewis*, C. P. 10 Wend. R. 541; *Judges of Lewis Com. Pleas v. The People ex relatione Butler et als.*, 15 Id. 110; *Everitt v. Knapp*, 6 Johns. R. 331; *Richmond v.*

security for a smaller sum of money, usually one-half of the amount of the judgment debt; and it is accordingly accompanied by a *defeazance*, which must be written on the same paper or parchment as the warrant of attorney^(m). This defeazance, as its *name imports, defeats [*90] the full operation of the warrant of attorney, by declaring that it is given only as a security for the smaller sum and interest, and that no execution shall issue on the judgment to be entered up in pursuance of the warrant of attorney, until default shall have been made in payment of such sum and interest at the time agreed on; but that, in case of default, execution may be issued (n). The defeazance also until recently contained an agreement that it should not be necessary for the creditor to issue a writ of *scire facias*, or do any other act for reviving the judgment or keeping the same on foot, although no proceedings should have been taken thereupon for the space of one year.

(m) See Rule of Courts of Queen's Bench and Common Pleas, M. 42 Geo. III., 2 East, 136; 3 Bos. & Pul. 310; Rule of Court of Exchequer, M. 43 Geo. III., Manning's Exchequer Practice, Appendix, 225; Barber v. Barber, 3 Taunt. 465; stat. 3 Geo. IV. c. 39, s. 4; 12 & 13 Vict. c. 106, s. 136; 1 & 2 Vict. c. 110, s. 60. Collateral securities must be noticed; Morell v. Dubost, 3 Taunt. 235.* If the attorney neglect to insert the defeazance, the security is not void between the parties, but only as against the assignees of the debtor, in case of his bankruptcy or insolvency; Shaw v. Evans, 14 East, 576; Morris v. Methin, 6 Barn. & Cress. 446; * Bennett v. Daniel, 10 Barn. & Cress. 500.*

(n) Warrants of attorney to confess judgment for securing any sum or sums of money, are, with some exceptions, liable to the same duty (one-eighth per cent. on the money secured) as bonds for the like purpose. Stat. 13 & 14 Vict. c. 97. See post, p. 99, n. (o).

Roberts, 7 Id. 319; Bennett v. Davis et al., 6 Cow. R. 393; Bontel v. Owens, 2 Sandf. Supr. C. R. 655; The Manhattan Co. v. Brower, 1 Cai. R. 511; Evans v. Begley, 2 Wend. R. 243; Truscott et al. v. King, 6 Barb. Supr. C. R. 346; Humphreys v. Rawn, 8 Wat. R. 78; Hutchinson v. McClure, 8 Har. R. 63. Where there is a dispute about facts, the court will direct a feigned issue to be formed; Frasier, jr., v. Frasier, 9 Johns. R. 80; Wintringham v. Wintringham, 20 Id. 296; Morey v. Shearer, 2 Cow. R. 465; Neff et al. v. Burr, 14 Serg. & Raw. R. 166.

In connection with the subject of warrants of attorney, the case of the Man. & Mec. Bk. of Philadelphia v. St. John, 5 Hill's R. 500, deserves notice on account of its singularity; in pronouncing the

opinion of the court, Bronson, J., says, "The authority to confess a judgment without process, must be clear and explicit, and must be strictly pursued. If the parties to this warrant of attorney, intend to authorize a judgment in any other State than Pennsylvania, which is very questionable, I think that they did not intend that a judgment should be entered in this State. Both the bond and the warrant describe two of the obligors as residents of the State of Pennsylvania, the third as a resident of New Jersey. The warrant, is addressed 'to John D. Smith, Esq., attorney of the Court of Common Pleas of Philadelphia, in the county of Philadelphia, in the State of Pennsylvania, or to any other attorney of the said court, or of any other court there or elsewhere, or to any pro-

Without such a provision, no execution could be issued after the expiration of a twelvemonth from the date of the judgment, without the expense and trouble of a writ of *scire facias*, calling on the debtor to inform the court, or show cause, why execution should not be issued (*o*). But the common law procedure act, 1852, now provides that during the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment (*p*). A warrant of attorney is also sometimes given for entering up judgment for a sum of money, in order to secure the regular payment of an annuity; in which case [91] the defeazance of course expresses that no execution shall *be issued until default shall have been made for so many days in some payment of the annuity, but that, in case of such default, execution may be issued from time to time (*q*).

A warrant of attorney is a very simple means of incurring a very serious liability. It need not even be under seal (*r*), though it generally is so. In order to guard against any imposition in procuring debtors to execute warrants of attorney or *cognovits* in ignorance of the effect of such instruments, it is provided by a recent act (*s*) that no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney

(*o*) Stat. Westm. the second, 13 Edw. I. c. 45.

(*p*) Stat. 15 & 16 Vict. c. 76, s. 128.

(*q*) See Cuthbert v. Dobbin, 1 C. B. 278.*

(*r*) Kinnersley v. Mussen, 5 Taunt. 264.*

(*s*) Stat. 1 & 2 Vict. c. 110, s. 9.

thonotary of any of the said courts.' The only thing which can carry the power beyond the courts 'at Philadelphia,' is the word 'elsewhere;' and although, if the parties had stopped there, the authority might have extended to our courts, the scope of the word 'elsewhere' is restricted by the words which immediately follow it, 'or to any *prothonotary* of any of the said courts.' This shows that the parties were speaking of such courts as had an officer

called a 'prothonotary,' and such courts only. The Pennsylvania courts have an officer of that name, but we have not." The construction here given to the instrument in question, is so utterly contrary to the known and long received reading of a form in common use in Pennsylvania, and to the plain meaning of the words used, that it is difficult to understand how such a decision could have been made.

See further on the subject of warrants

shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney (1). And a warrant of attorney or cognovit not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (t). Unless, therefore, the act be strictly complied with, the warrant of attorney or cognovit will be invalid (u). Every acknowledgment of satisfaction of a judgment is also required to be attested in a similar manner (v) (2).

*Not only was there a risk of debtors being imposed upon, [*92] in being prevailed on to execute warrants of attorney, but creditors also were formerly liable to be defrauded, by their debtors giving secret warrants of attorney, cognovits, or judge's orders, to some favoured creditors, to the prejudice of the others. In order to obviate this inconvenience, provision has been made by modern acts of

(t) Sect. 10.

(u) *Potter v. Nicholson*, 8 Mee. & Wels. 494; * *Everard v. Popleton*, 5 Q. B. 181.*

(v) Reg. Gen. Trin. 11 Vict.

of attorney, and judgments thereon, the following cases; *Montelius v. Montelius*, 5 Pa. L. Jour. 92; *Helvete v. Rapp*, 7 Serg. & Raw. R. 306; *Commonwealth to the use, &c., v. Conrad et al.*, 1 Raw. R. 249; *Rabe v. Heslip et al.*, 4 Barr's R. 139; *McCalmont, adm'r, v. Peters*, 13 Serg. & Raw. 196; *Hays v. The Commonwealth*, 2 Har. R. 39; *Chambers v. Denie*, 2 Barr's R. 422; *Enew v. Clark*, Id. 234; *Hall et al. v. Law*, 2 Wat. & Serg. R. 135; *Finney v. Ferguson*, 3 Id. 413; *Chambers v. Harger*, 6 Har. R. 16; *James v. Jarrett*, 5 Id. 370; *Kirkbride et al. v. Durden*, 1 Dal. R. 288.

(1) This doctrine has been applied in the State of New York to the execution of a warrant of attorney by a person in custody; thus, *Mason J.*, in *Boutel v. Owens*, 2 Sandf. Supe. C. R. 655, says, "It has long been a rule of the English courts, that no warrant of attorney executed by any person in custody of any sheriff or other officer, for the confession of any judgment, shall be valid or of any force, unless there

be present some attorney on behalf of such person in custody, to be named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney before the same is executed; and the attorney is required to subscribe his name to the due execution thereof. * * *

* * This rule was never adopted in terms by the Supreme Court of this State, but the practice of the court appears to have always been in accordance with it." It is somewhat singular, that this principle has not with us, as in England, been extended to cases of warrants of attorney other than those executed by prisoners; such a rule, applied to the execution of all warrants of attorney, could be productive of no injury, but would, on the contrary, tend to prevent fraud or imposition.

(2) By a rule of the District Court for the City and County of Philadelphia, no satisfaction of a judgment shall be entered of record unless attested by the prothonotary, or by one of his clerks, with the date of the entry.

parliament for the filing, in the office of the Court of Queen's Bench, of all warrants of attorney, with the defeazances thereto, and of all cognovits, and of all such judge's orders as before mentioned, or of copies thereof, within twenty-one days after their execution (*w*). And, in the event of the insolvency of the debtor after the expiration of this time, unless any such warrant of attorney or cognovit, or a copy thereof, shall have been filed within such a time, or unless judgment shall have been signed (*x*) within such time, the warrant of attorney or cognovit, and the judgment and execution thereon, will be void as against the assignees of such insolvent (*y*). And in the event of bankruptcy, unless any such warrant of attorney, or cognovit, or judge's order, or a copy thereof, shall have been filed within the time above limited, the same is now void as against the assignees of the [93] bankrupt (*z*), although judgment may *have been signed within the time (*a*). And a list of such warrants of attorney, cognovits, and judge's orders (*b*), and also an index containing the names, additions and descriptions of the persons giving the same (*c*), is directed to be kept by the officer of the Queen's Bench, open to public inspection and search on payment of a small fee. It is also provided that every warrant of attorney to confess judgment in any personal action given by any bankrupt, within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every *cognovit actionem* or consent to a judges' order for judgment given by any bankrupt, within two months of the filing of any such petition in any action commenced by collusion with the bankrupt and not adversely, or purporting to be given in an action, but having in fact been given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engage-

(*w*) Stat. 3 Geo. IV. c. 39, ss. 1, 3; 12 & 13 Vict. c. 106, s. 137.

(*x*) The words of the act are, "unless judgment shall have been signed or execution issued," but these latter words have no meaning, for execution cannot be issued till judgment is signed; and the Court of Queen's Bench has refused to read the words as "*and execution levied*," which would indeed be making sense, but would be framing, instead of interpreting the law; *Green v. Wood*, 7 Q. B. 178.

(*y*) Stats. 3 Geo. IV. c. 39, ss. 2, 3; 1 & 2 Vict. c. 110, s. 60; 7 & 8 Vict. c. 96, s. 20; *Biffin v. Yorke*, 5 Man. & Gr. 428; * *Collis v. Stone*, 4 Q. B. 655.* The twenty-one days are reckoned exclusively of the day of execution; *Williams v. Burgess*, 12 Adol. & Ell. 635.*

(*z*) Stat. 12 & 13 Vict. c. 106, ss. 136, 137; *Bryan v. Child*, 5 Ex. Rep. 368.*

(*a*) *Acraman v. Herniman*, Q. B. 15 Jur. 1008.

(*b*) Stat. 3 Geo. IV. c. 39, s. 5; 12 & 13 Vict. c. 106, s. 137.

(*c*) Stat. 6 & 7 Vict. c. 66.

ments at the time of giving such warrant of attorney, *cognovit actionem*, or consent (as the case may be), shall be void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not (*d*).

In addition to these precautions, other provisions have been made to prevent an undue preference being given to one creditor over the others by means of a warrant of attorney, *cognovit*, or judge's order in the event of the debtor becoming bankrupt or insolvent. When once the judgment of a court of record was allowed to be diverted from its proper end of expressing and enforcing the opinion of the court, to serve the purpose of a mere *security for money due, it was [*94] found necessary to guard its use by provisions of the legislature, which have added much to the intricacy of the law. The effect of these provisions appears to be, that if a judgment be entered up against a person by reason of any warrant of attorney, *cognovit*, or judge's order, no execution taken out on such judgment against his goods can avail the judgment creditor, if such execution be not completed, by sale of the goods, before the creditor has notice of an act of bankruptcy committed by the debtor, and before a petition for adjudication of bankruptcy issues against such debtor, in case of his bankruptcy (*e*), and before his imprisonment in case of his insolvency (*f*). If the execution be not so previously completed by sale of the goods, the judgment creditor has no other remedy than to come in for his dividend rateably with the other creditors. But a judgment obtained by default or *nihil dicit* in an adverse suit was not until recently within this rule; nor, in the event of the issuing of a fiat in bankruptcy, was a judgment obtained on a *cognovit*, if the action were commenced adversely and not by collusion (*g*). In the case of judgment so obtained, therefore, seizure of the debtor's goods under an execution, if made before the creditor had notice of his having committed an act of bankruptcy, and before the issuing of the fiat in bankruptcy, was valid as against the other creditors, although the execution might not have been completed by sale of the goods (*h*).

(*d*) Stat. 12 & 13 Vict. c. 106, s. 135.

(*e*) Stat. 12 & 13 Vict. c. 106, ss. 133, 184, repealing stat. 6 Geo. IV. c. 16, s. 108.

(*f*) Stat. 1 & 2 Vict. c. 110, s. 61; *Squire v. Huetson*, 1 Q. B. 308.* See also stat. 7 & 8 Vict. c. 96, s. 21.*

(*g*) Stat. 1 Will. IV. c. 7, s. 7; see *Crossfield v. Stanley*, 4 Barn. & Adol. 87; * S. C. 1 Nev. & Man. 668; *Bell v. Bidgood*, 8 C. B. 763.*

(*h*) See stat. 2 & 3 Vict. c. 29.

But under the recent act to amend and consolidate the laws relating to bankrupts, sale as well as seizure is now necessary in every case (i).

[*95] *Every judgment debt carries interest at the rate of *4l. per cent. per annum* from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*k*) (1). On the death of the debtor, his judgment debts must be paid in full by his executors or administrators out of his personal estate before any of his debts on

(i) Stat. 12 & 13 Vict. c. 106, s. 184; *Hutton v. Cooper*, 6 Ex. Rep. 159.*

(k) Stat. 1 & 2 Vict. c. 110, s. 17.

(1) Neither debts due by contract, or by judgment, would bear interest, unless it were so provided by positive legislation; *Hamer et al. v. Kirkwood et al.*, 25 Missi. R. 95; but it is believed, that in all of the States except North Carolina, interest has been made an incident to judgments; The Commonwealth for the use, &c., *v. Vanderslice et al. admr's*, 8 Serg. & Raw. R. 452; *Ijams et al. v. Rice, use, &c.*, 17 Alaba. R. 404; *Thompson v. Thompson*, 5 Ark. R. 18; *Mayor, &c., of Macon v. The Trustees of the Bibb County Academy*, 7 Geo. R. 205; *Kintner v. The State*, 3 Port. (Inda.) R. 92; *Chamberlain v. Maitland & Co.*, 5 B. Mon. R. 449; *Aubic v. Gill*, 7 Rob. R. 50; *Gwinn v. Whitaker*, 1 Har. & Johns. R. 754; *Williams, adm'r, v. The American Bank et als.*, 4 Metcf. R. 317; *Hodgdon v. Hodgdon*, 2 N. H. R. 169; *Mahurin v. Bickford*, 6 Id. 568; *Sayre v. Austin*, 3 Wend. R. 496; *Graham v. Newton*, 12 O. R. 210; *Fitzgerald v. Caldwell's Exec's*, 4 Dal. R. 261; *The Commonwealth v. Miller's adm'r's*, 8 Serg. & Raw. R. 452; *Mohn v. Hiester*, 6 Wat. R. 53; *Fishburne, exec. of Snipes v. Sanders*, 1 Nott & McC. R. 242; *Norwood v. Manning*, 2 Id. 395; *Adm'r of Pickney v. Singleton*, 2 Hill's (S. C.) R. 343; *Gatewood v. Palmer*, 10 Hump. R. 469; *Crabb v. The Nashville Bank*, 6 Yerg. R. 332. In North Carolina, it has been decided, that interest is not to be calculated upon a judgment, but on the principal of the debt, until the time of payment; *Satterwhite v. Carson*, 3 Ired. L. R. 549; and, where judgment is entered for the penalty of a bond, interest can only be calculated upon the amount found due; *Nice et al. v. Turrentine*, 13 Ired. L. R. 212; in which last doctrine, however, North Carolina does not stand alone, *Thomas v. Wilson*, 3 McCord's R. 166.

The rule, that interest is incident to judgments, applies even in those cases where judgment has been rendered for a cause of action which does not bear interest, as for unliquidated damages; *Wright v. Abbott*, 6 Ann. (La.) R. 569; *Marshall v. Dudley*, 4 J. J. Marsh. R. 244; *Klock v. Robinson*, 22 Wend. R. 157; *Lord v. The Mayor, &c., of New York*, 3 Hills' (N. Y.) R. 427; *Harrington v. Glenn*, 1 Hill's (S. C.) R. 79.

In the case of a revival of a judgment, the original judgment, and the interest form a new principal upon which interest is to be subsequently calculated; *Verree et al. v. Hughes*, 6 Halst. R. 91; *Fries v. Watson*, 5 Serg. & Raw. R. 220; *Meason's Estate*, 5 Wat. R. 464; this doctrine applies, also, to a judgment in a *scire facias* against a garnishee, in foreign attachment; *Flanagin v. Wetherill*, 5 Whart. R. 280; and interest as well as principal can be collected on execution; *Ijams et al. v. Rice, use, &c.*, 17 Alaba. R. 404; *Berryhill v. Wells*, 5 Bin. R. 56; *Adm'r's of Kirk v. The Exec's of Richbourg*, 2 Hill's (S. C.) R. 352; *Martin v. Kilbourne*, 11 Vt. R. 93,

bond or by simple contract (*l*) (1). The decree of a court of equity is equivalent to the judgment of a court of law (*m*). And the privilege

(*l*) Wentworth's Exors. 265, *et seq.* 14th edit.; Williams on Executors, pt. iii. bk. 2, c. 2, s. 2; Berrington v. Evans, 3 Y. & Col. 384.

(*m*) Shafto v. Powel, 3 Lev. 355.

but in the State of Tennessee in a *scire facias* on a judgment, no interest can be recovered; Allen v. Adams et al., 15 Hump. R. 16; Hall v. Hall, 8 Id. 156.

In some of the States, it has been made lawful, for the parties to a contract, to stipulate for a greater rate of interest than that fixed by statute; yet, upon the judgment, only the statutory rate of interest shall be allowed; Borry v. Makepeace, 3 Port. (Ind.) R. 154; Burkhart v. Sappington, 1 Iowa R. 66; Hawkins et al. v. Ridenhour, 13 Misso. R. 125; but see to the contrary, Hamer et al. v. Kirkwood et al., 25 Missi. R. 95; in other States, where the parties have contracted for a rate of interest, that rate of interest shall be continued after judgment, not upon the judgment, but upon the principal of the debt or claim; Tindale v. Meeker, 1 Scam. R. 137; Aubic v. Gill, 7 Rob. R. 50.

In Alabama, in an action of debt upon a judgment obtained in a sister state, and judgment had by *nil dicit*, &c., interest cannot be calculated upon the original judgment, at the rate allowed by law in the state where it was obtained, unless a jury shall first find what that rate of interest is; Clarke v. Pratt, 20 Alaba. R. 470; Mobile & Cedar Point R. R. Co. v. Talman et al., 15 Id. 472; Harrison et al. v. Harrison, 20 Id. 629.

By the sixty-second rule of the Supreme Court of the United States, it is provided, that "In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest, in the courts of the state where such judgment is rendered," &c. See Perkins v. Fourniquet et al., 14 How. (U. S.) R. 328.

(1) The order in which the debts of a decedent are to be paid, is regulated by the statute law of the several states, and in many of them, judgments have no precedence over debts due by specialty or simple contract; but in the absence of any enactment on the subject, judgments have a legal priority, according to the rules of the common law; Nimmo's exec. v. The Commonwealth, 4 Hen. & Munf. R. 57; and the decree of a court of equity is equivalent to the judgment of a court of law; In the matter of the estate of John Sperry, dec'd, 1 Ash. R. 347; Thompson v. Brown, 4 Johns. Ch. R. 619. On the subject of the payment of the debts of a decedent, see Robertson v. Demoss, adm'r, 23 Missi. R. 300; Bason, adm'r, v. Hughart, 2 Tex. R. 476; Place, &c., v. Oldham's adm'r, 10 B. Mon. R. 400; Smith et al. v. The State of Maryland, 5 Gill's R. 45; The State of Maryland v. The Bank of Maryland, 6 Gill & Johns. R. 207; Thomas v. McElwee, 3 Strobb. L. R. 131; Williams, adm'r, v. John W. & Wm. Benedict, trading, &c., 8 How. (U. S.) R. 107; Greenough's Ap., 9 Barr's R. 18; The State on the relation, &c., v. Johnson et al., 7 Ired. L. R. 231; Malis & Co. v. Adm'rs of Jones, 2 Richard. L. R. 393; Deichman's Ap., 2 Whart. R. 395; United States v. Duncan, 4 McLean's R. 607; The Commonwealth for the use, &c., v. Lewis, 6 Bin. R. 266.

The position, that the personality of a decedent is to be first applied to the payment of his debts, is well established. In Pennsylvania, it has been decided by the case of Hoover v. Hoover, 5 Barr's R. 351, that the assets shall be applied in the following order to the payment of the debts: 1. The general personal estate not expressly or by implication exempted; 2. Lands expressly devised to pay debts; 3. Estates descended to the heir; 4. De-

of priority of payment extends to the judgments of every court of record, whether superior or inferior; but the judgment of a foreign court is entitled to no precedence over a simple contract debt (*n*). The remedies of the creditor by judgment of any of the superior courts, against the real estate of his debtor, are mentioned in the author's treatise on the Principles of the Law of Real Property (*o*). The remedies against the choses in possession of the debtor have been referred to in a previous part of the present work (*p*). The remedies in respect of the choses in action of the debtor will be hereafter mentioned. In addition to these remedies, such a judgment creditor may imprison the person of his debtor by means of the writ of *capias ad satisfaciendum* (*q*); but, should he do so, he will relinquish all right and title to the benefit of any charge or security which he may have obtained by virtue of his judgment (*r*). If, however, the debt should not exceed 20*l.*, the debtor cannot be imprisoned (*s*) without a previous [*96] summons and examination* before a commissioner of bankrupt or a judge of a court for the recovery of small debts, who will order the commitment of the debtor only in case of fraud or other ill

(*n*) *Dupleix v. De Proven*, 2 Vern. 540. See also *Smith v. Nicolls*,* 5 Bing. N. C. 208.

(*o*) P. 63, *et seq.*, 2d ed.; 66, 3d ed.

(*p*) Ante, p. 46.

(*q*) Bac. Abr. tit. Execution (C) 3.

(*r*) Bac. Abr. tit. Execution (D); stat. 1 & 2 Vict. c. 110, s. 16.

(*s*) Stat. 7 & 8 Vict. c. 96, s. 57.

vised lands *charged* with the payment of debts *generally*, whether devised in terms general or specific (every devise of land being in its nature specific); 5. General pecuniary legacies, *pro rata*; 6. Specific legacies, *pro rata*; 7. Real estate devised, whether in terms general or specific. In New York, by *Livingston v. Newkirk*, 3 Johns. Ch. R. 312, the order of application was established, as, 1. The general personal estate; 2. Estates devised *expressly*, for the payment of debts, and for that purpose only; 3. Estates descended; 4. Estates specifically devised, though *charged generally* with the payment of debts. Which last has also been decided to be the order of application in Kentucky, by *McC Campbell v. McC Campbell*, 5 Litt. R. 95, viz.: 1. The general personal estate; 2. The estate *especially* and *expressly* devised to be sold; 3. The estate descended; 4. The estate specifically devised, though *charged generally* with the payment of debts. In Massachusetts, by the case of *Hays v. Jackson*, 6 Mass. R. 149, the order was settled, as follows: 1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts; 2. The real estate, appropriated in the will as a fund for the payment of debts; 3. The descended estate, whether the testator was seized of it when the will was made, or it was afterwards acquired; 4. The rents and profits of it received by the heir after the testator's death; 5. The lands specifically devised, although *generally charged* with debts, yet not specially appropriated for that purpose. And see, *Stuart v. Exec. of Carson*, 1 Desaus. R. 500; *Hall et ux. v. Sayre*, 10 B. Mon. R. 46.

behaviour (*t*); and the imprisonment will not then operate as any satisfaction of the debt (*u*) (1).

Judgments of the inferior courts may be removed into the superior courts by order of any judge of the latter courts; and immediately on such removal the judgment has the same force, charge and effect, as a judgment of the superior court (2); but it cannot affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, any further than it would have done had it remained a judgment of the inferior court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same (*v*). A registry is now provided for judgments in the county courts for the sum of 10*l.* and upwards (*x*).

In addition to judgment debts, other debts of record are *recognizances* when duly enrolled (*y*), and statutes merchant, statutes staple and recognizances in the nature of statutes staple. The three last are now quite obsolete. A recognizance is an obligation entered into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, or to pay a debt (*z*). It is payable out of the personal estate of the debtor, in the event of his decease, next after judgment debts (*a*).

(*t*) Stat. 8 & 9 Vict. c. 127; 9 & 10 Vict. c. 95, s. 99.

(*u*) Stat. 8 & 9 Vict. c. 127, s. 3; 9 & 10 Vict. c. 95, s. 103.

(*v*) Stat. 1 & 2 Vict. c. 110, s. 22. See Sugd. Vend. & Pur. 670.

(*x*) Stat. 15 & 16 Vict. c. 54, s. 18.

(*y*) Glynn v. Thorpe, 1 Barn. & Ald. 153.

(*z*) 2 Bla. Com. 341.

(*a*) Williams on Ex'ors, pt. iii. bk. 2, c. 2, s. 2.

As to the judgments of foreign states, and that they are not entitled to the priority due judgments obtained against the decedent, in the state where he resided, but, on the contrary, rank with simple contract debts, see, *Brengle v. McClellan*, 7 Gill & Johns. R. 434; *Hubbell v. Coudry*, 5 Johns. R. 132; *Cameron v. Wurtz*, 4 McC. R. 278.

(2) Although judgments obtained before a justice of the peace, when filed in the Common Pleas, or made known to the administrators, must be paid *pro rata* with judgments in a court of record, *Scott, adm'r, v. Ramsay*, 1 Bin. R. 221, yet, where a judgment was obtained before a justice of the peace against the defendant, and, after his death, a transcript of the judgment was filed in the office of the Prothonotary of the Court of Common Pleas, and subsequently the real estate of the defendant was sold by his administrators

(1) In many of the States of the Union, imprisonment for debt has been abolished by acts of legislation. Suits for fines and penalties are excepted from the effect of these statutes, nor do they embrace actions for trespass or torts; and arrest is usually permitted where the debt has been fraudu-

[*97] *Next in importance to debts of record are *specialty debts*, or debts secured by *special contract* contained in a *deed* (b). These are of two kinds, debts by specialty, in which the heirs of the debtor are bound, and debts by specialty in which the heirs are not bound. On the decease of the debtor, both these classes of specialty debts stand on a level so far as regards their payment out of the personal estate of the debtor. They rank next after debts of record, and take precedence of all debts by simple contract (c), with the exception of money owing for arrears of rent, to which the feudal principles of our law have given an importance equal to that of debts secured by deed (d). Debts by specialty in which the heirs are bound have, however, a precedence over those in which the heirs are not bound, in case the real estate of the debtor should be resorted to on his decease (e), unless he should have charged his real estates by his will with the payment of his debts, in which case all the creditors of every kind will be paid out of the produce of such real estates, without any preference (f). For the sake of the advantage which may thus be gained on the decease of the debtor, his heirs are usually bound in every specialty debt. The deed creating the debt may be either a deed of *covenant* or a *bond*. A covenant runs thus: "And the said (debtor) doth hereby for himself, his *heirs*, executors and administrators, covenant with the said (creditor), his executors and administrators," to pay, &c. A bond is in the following form: "Know all men by these presents, that I (debtor), of (such a place), am held and firmly bound to (creditor), of (such a place), in the penal sum of 1000*l.* of lawful money of Great Britain, to be paid *to the said (creditor) or to his certain attorney, executors, administrators or assigns, for which payment to be well and truly made I bind myself, my *heirs*, executors and administrators, and every of them, firmly by these presents. Sealed with my seal. Dated this 1st day of January, 1848." In both of the above cases it will be observed that the executors and administrators are bound as well as the heirs. This, however,

(b) 2 Bla. Com. 465. See ante, p. 65.

(c) Pinchon's case, 9 Rep. 88 b.

(d) Wentworth's Ex'ors, 28*l.*, 14th edit.; Clough v. French, 2 Coll. 277.

(e) See Principles of the Law of Real Property, 60, 2nd ed.; 63, 3rd ed.

(f) 2 Jarm. Wills, 510.

under an order of the Orphans' Court, the proceeds of the sale, over either "physic, Court held, that the judgment was not a funeral expenses, servants' wages," &c.; lien on the lands of the intestate, and that In the matter of the estate of Wm. Patter- it had no priority of payment out of the son, dec'd, 1 Ash. R. 336.

is not absolutely necessary, and the covenant or bond would be equally effectual if the heirs only were named in it (*g*).

A bond in the form above mentioned, without any addition to it, is called a single bond. Bonds, however, have usually a condition annexed to them, that on the person bound (called the obligor) doing some specified act (as paying money when the bond is to secure the payment of money), the bond shall be void. The condition of an ordinary money bond is as follows: "The condition of the above-written bond or obligation is such, that if the above-bounden (*debtor*), his heirs, executors or administrators should pay unto the said (*creditor*), his executors, administrators or assigns, the full sum of 500*l.* (*usually half the amount named in the penalty*) of lawful money of Great Britain, with interest for the same after the rate of 5*l. per cent. per annum*, upon the — day of — now next ensuing, without any deduction or abatement whatsoever, then the above-written bond or obligation shall be void, otherwise the same shall remain in full force." Bonds with conditions of this kind have been long in use. In former times, when the condition was forfeited the whole penalty was recoverable (*h*). Equity subsequently interfered, and prevented the creditor from enforcing more than the amount of the damage which he had actually sustained. *The courts of law at length began to [*99] follow the example of the courts of equity; and according to a course of proceeding, of which there are many examples in the history of our law, the legislature more tardily adopted the rules which had already been acted on in the courts; and by a statute of the reign of Queen Anne it was provided, that, in case of a bond with a condition to be void upon payment of a lesser sum, at a day or place certain, the payment of the lesser sum with interest and costs shall be taken in full satisfaction of the bond, though such payment be not strictly in accordance with the condition (*i*). But if the arrears of interest should accumulate to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor can claim no more than the penalty either at law (*k*) or in equity (*l*). If, however, there be special circumstances in the creditor's favor, as if he have a mortgage

(*g*) Co. Litt. 209 a; Barber v. Fox, 2 Wms. Saund. 136.

(*h*) Litt. s. 340.

(*i*) Stat. 4 & 5 Anne, c. 16, ss. 12, 13. See 3 Burr. 1373; 2 Bla. Com. 341; Smith v. Bond, 10 Bing. 125; * S. C. 3 Moo. & Scott, 528; James v. Thomas, 5 Barn. & Adol. 40.*

(*k*) Wild v. Clarkson, 6 T. R. 303.

(*l*) Clarke v. Seton, 6 Ves. 411; Hughes v. Wynne, 1 My. & Keen, 20.

also for the principal and interest (*m*), or if the debtor has been delaying him by vexatious proceedings (*n*), equity will then aid him to the full extent of his demand (*o*).

Bonds are frequently given, not only for securing the payment of money on a given day, but also with conditions to be void on the performance of many other acts agreed to be done, or on the payment of money by instalments. In such cases the law formerly was, that [*100] *on the breach of any part of the condition, the whole penalty became due; and judgment and execution might be had thereon, subject only to the control of a court of equity on application to it for relief. But now in such cases, the obligee (or person to whom the bond is made) must, in bringing his action, state or *assign* the breaches which have been made by the obligor (*p*); and although judgment is still recovered for the whole penalty, execution of such judgment is allowed to issue only for the damages in respect of the breaches actually committed; and the judgment remains as a further security for the damages to be sustained by any future breach (*q*).

The last and most numerous, though least important, class of debts in the eye of the law, are debts by simple contract, which are all debts not secured by the evidence of a court of record, or by deed or specialty. On the decease of the debtor, these debts are payable out

(*m*) *Clarke v. Lord Abingdon*, 17 Ves. 106.

(*n*) *Grant v. Grant*, 3 Sim. 340.

(*o*) 6 Ves. 416. By the last Stamp Act, 13 & 14 Vict. c. 97, bonds and covenants for the payment of any definite and certain sum of money are, with some exceptions, charged with an *ad valorem* duty of one-eighth per cent. or half-a-crown per hundred pounds on the money secured, according to the following table contained in the act:—

	s.	d.
Not exceeding £50	1	3
Exceeding £50 and not exceeding £100	2	6
“ 100 “ 150	3	9
“ 150 “ 200	5	0
“ 200 “ 250	6	3
“ 250 “ 300	7	6
And where the same shall exceed £300 then for every £100 and also for any fractional part of £100	2	6

It may be remarked, that for sums not exceeding £150 the duty is less than on a bill or note, whilst the security is greater,

(*p*) See the judgment of Parke, B., in *Grey v. Friar*, 15 Q. B. 891, 910.*

(*q*) Stat. 8 & 9 Will. III. c. 11, s. 8; *Hardy v. Bern*, 5 T. R. 636; *Willoughby v. Swinton*, 6 East, 550; 1 Wms. Saund. 57, n. (1); *Hurst v. Jennings*, 5 Bar. & Cres. 650; * S. C. 8 Dow. & Ry. 424.

of his personal estate, by his executor or administrator, subsequently to all debts of record or by specialty, except voluntary bonds, which are payable after all simple *contract debts, but before any of the legacies (r) (1). Debts secured by bills of exchange and promissory notes have no preference over the other simple contract debts of the deceased (s).

Thus it will be seen that there are now, according to the law of England, five principal kinds of debts, namely, crown debts, judgment debts, specialty debts in which the heirs are bound, specialty debts in which the heirs are not bound, and simple contract debts. Each of these classes has a law of its own, and remedies of varying degrees of efficacy. According to natural justice one would suppose that all creditors for valuable consideration should have an equal right to be paid; or if any difference were allowed, that those who could least afford to lose should be preferred to the others. Our law, however, takes precisely the opposite course, and, for reasons which certainly illustrate the history of England, gives to the crown, representing the public in the aggregate, who can best afford to lose, a decided preference over private creditors, whose loss may be their ruin. Again, a debt admitted without dispute, gives the creditor far less advantage than a debt which has been contested and decreed to be paid by the judgment of a court of record. The proper function of a court of judicature would seem to be the settlement of disputes. In our law, however, the judgment of the court is permitted to be made use of not only to settle contested claims, but also as a better security for money admitted to be due. The reason of this perversion of the proper end of a judgment has been the superior advantages possessed by a creditor having a judgment in his favour. So long, however, as the court exercises its legitimate function of deciding on contested claims, *there seems to be no reason why a debt established by the decision of the court should have any preference over one which has never been disputed. If this were the case, the use of judgments as mere securities, by collusion or agreement of the parties,

(r) *Lomas v. Wright*, 2 My. & Keen, 769; *Watson v. Parker*, 6 Beav. 283.

(s) *Yeoman v. Bradshaw*, 3 Salk. 164.

(1) A voluntary bond, in law, as well as postponed to any just debts, though due at equity, is good between the parties, but by simple contract; *Stephens v. Harris* et in the course of administration, it must be al., 6 Ired. Eq. R. 57.

would at once fall to the ground; and an end would be put to a very fruitful source of litigation and fraud. Practically there are but two reasons why payment of a debt is withheld, namely, either because the debtor, though able to pay, doubts his liability, or because he is unable to pay, though he knows he is liable. In the first case an action at law decides the question; but the judgment given by the court in exercise of its proper function, is scarcely ever followed by the taking out of execution. The debt being established, the debtor pays it, and the judgment is immediately satisfied. The creditor has the advantage of the decision of the court, but he has no occasion for any of those extraordinary remedies to which his position as a judgment creditor entitles him. If, however, the debtor is unable to pay, judgment is obtained merely for the sake of its fruit. The creditor endeavors, by suing out an execution, to obtain an advantage over other creditors, who may not have put themselves and the debtor to the same trouble and expense. But inability to pay one debt is presumptive evidence of inability to pay others; and when a man is unable to pay all his creditors in full, it is time that a distribution should be made of his property amongst his creditors rateably. The extraordinary privileges conferred on a judgment creditor seem, therefore, in most cases, practically to end in an undue preference of a pressing creditor over others who have as good a right to be paid. With respect to the three last classes of debts, namely, debts by specialty in which the heirs are bound, those in which the heirs are not bound, and simple contract debts, the distinctions between them [*103] serve principally to mark the steps of the struggle by which the rights of creditors have at length been obtained. The trophies of a victory so hardly won can scarcely be expected to present a very orderly appearance. The rights of these creditors accordingly vary with the accident of the death of the debtor, with the proportion which his real estate may bear to his personalty, and with the circumstance of his having or not having charged his real estate by his will with the payment of his debts; although as we shall see, he can bring them all to a level by becoming, if he please, a bankrupt or insolvent. Surely it is time that the law of debtor and creditor were placed upon some more simple and reasonable footing.

The next subject which claims our attention is that of interest upon debts. The absurd prejudice which anciently caused interest, under the name of usury, to be considered unlawful, retained some hold

upon our law long after the taking of interest was rendered lawful by act of parliament (*t*). In ordinary cases a debtor was allowed to withhold payment of his debt, without being obliged to give to his creditor the poor recompense of interest on the money he was making use of for his own benefit. For until recently it was a general rule of law, that interest was not payable on any debts, whether by specialty or simple contract, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances, or unless the debt were secured by a bill of exchange or promissory note, which, being mercantile securities, always carried interest (*u*). But in equity interest was more frequently allowed (*x*). And now by a recent act (*y*) interest is *recoverable on all debts payable by [*104] virtue of any written instrument, at a certain time, from the time when such debts were payable, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

The payment of a debt is sometimes secured by a *surety*, who makes himself liable, together with the principal debtor, for the payment (1). If the surety should pay the debt, he will become the

(*t*) Stat. 37 Hen. VIII. c. 9.

(*u*) *Higgins v. Sargent*, 2 Barn. & Cres. 348; * *S. C.* 3 Dow. & Ry. 613; *Foster v. Weston*, 6 Bing. 709; * *Page v. Newman*, 9 Barn. & Cres. 378.*

(*x*) See *Lowndes v. Collins*, 17 Ves. 27; 2 Fonb. Eq. 429; *C. P. Cooper*, 246 *et seq.*

(*y*) Stat. 3 & 4 Will. IV. c. 42, ss. 28, 29; *Hyde v. Price*, 8 Sim. 578.

(1) Although in the case of principal and surety, the liability of the latter is not of a primary character, yet the creditor is not bound to pursue the principal before resorting to the surety; *Abercrombie v. Knox*, 3 Alaba. R. 728; but in Pennsylvania, a distinction has been taken between surety and guaranty; where the latter term is used, or the contract is of that nature, the creditor must enforce his remedies against the principal debtor before he resorts to the guarantor; or, he must show that the affairs of the principal debtor were in such a condition, that any pursuit of him would have been utterly fruitless; *Parker v. Culvertson*, 1 Wall. Jr. R. 149; *Margerger et al. v. Pott*, 4 Har. R. 9; *Stroehecker v. The Farmers' Bank*, 6 Barr's R. 44; *Johnston v. Chapman*, 3 Pa. R. 18; *Rudy v. Wolfe et al.*, adm'rs, 16 Serg. & Raw. R. 79; and see also, *Mackie's exec. v. Davis, &c.*, 2 Washing. R. 229; *Berkendale v. Fenwick*, 2 Hen. & Munf. R. 113, n.; *Crumpton v. McNair*, Wend. R. 457. If the surety pays the debt, he has a right to call upon the principal for indemnification; *Williams v. Williams*, 5 O. R. 444; *Odlin v. Greenleaf*, 3 N. H. R. 270; *Gibbs v. Bryant*, 1 Pick. R. 118; *Peters v. Barnhill*, 1 Hill's (S. C.) R. 234; *Hunt v. Amidon*, 4 Hill's R. 345; *Wesley Church v. Moore et al.*, 10 Barr's R. 273; *McCrea v. Parmont*, 16 Wend. R. 460, S. C. 5 Paige's R. 620; *Heart v. Johnson*, 13 Vt. R. 19; *Manri v. Hefferman*, 15 Johns. R. 58; *Pigou v. French*, 1 Wash. C. C. R.

creditor of the principal debtor for the amount; but although the debt paid should have been secured to the original creditor by the

278; *Bennett v. Buchanan*, 3 Port. (Inda.) R. 47; *Williamson's adm'r's v. Hall*, 1 McCook's R. 190; *Collins, adm'r, v. Boyd*, 14 Alaba. R. 505; *Hommell v. Gamewell*, 5 Blackf. R. 5; *Shepard v. Ogden*, 2 Scam. R. 257; *Hill v. Campbell*, 10 B. Mon. R. 80; *Laughlin v. Ferguson*, 6 Dana's R. 113; *Clark v. Foxcroft*, 7 Maine R. 348; *Ghlespie, adm'r, v. Creswell et al.*, 12 Gill. & Johns. R. 27; *Mowry v. Adams*, 14 Mass. R. 327; *Williams et ux. v. Moore*, 9 Pick. 432; *Appleton et al. v. Bascomb et als.*, 3 Metc. R. 171; *Wood v. Leland*, 1 Id. 389; *Ford v. Keith*, 1 Mass. R. 138; *Johnson v. Johnson*, 11 Id. 359; *The State to the use, &c., v. Reynolds et als.*, 3 Misso. R. 70; *Jeffers et al. v. Johnson*, 1 Zab. R. 76; *Chace v. Hinman*, 8 Wend. R. 452; *Aberdeen v. Blackwell*, 6 Hill's R. 321; *Bonney v. Seely et al.*, 2 Wend. R. 481; *Powell v. Smith*, 8 Johns. R. 249; *Tom v. Goodrich*, 2 Id. 213; *Gould v. Gould*, 8 Cow. R. 168; *Wynn, adm'r, v. Brooke et als.*, 5 Raw. R. 106; *Cornwell's Ap. v. Wat. & Serg.* R. 305; *Pursel v. Ellis*, 5 Id. 525; for, by the very fact of payment, he becomes the creditor of the principal, taking the position which the original creditor held, and entitled to all the preferences which the original creditor claimed; *Youghe v. Linton*, 6 Richard L. R. 275; *Winchester v. Beardin*, 10 Hump. R. 247; *McDaniels v. The Flower Brook Manufac. Co.*, 23 Vt. R. 274; *Westcott v. King*, 14 Barb. Supre. C. R. 33; *Foster v. The Trustees of the Athenæum*, 3 Alaba. R. 310; *Sanders et al. v. Watson et al.*, 14 Id. 198; *McDowell v. The Bk. of Wilmington and Brandywine*, 1 Harring. R. 369; *Pitzer v. Harmon*, 8 Blackf. R. 112; *Schoolfield's adm'r v. Rudd, &c.*, 9 B. Mon. R. 292; *Grider v. Payne*, 9 Dana's R. 191; *Patterson v. Pope*, 5 Id. 243; *Sargent v. Salmond et al.*, 27 Maine R. 348; *Eppes et als., exec's, v. Randolph*, 2 Call's R. 103; *Graves v. Webb*, 1 Id. 443; *Tinsley v. Oliver's adm'r, &c.*, 5 Munf. R. 419; *Tinsley v. Anderson*, 3 Call's R. 329; *Enders, &c., v. Brune*, 4 Rand. R. 438; *Watts et als. v. Kinney et ux.*, 3 Leigh's R. 272; *Cole, Co. et al. v. Augbey et als.*, 12 Misso. R. 132; *The New York State Bk. v. Fletcher*, 5 Wend. R. 85; *Clason et al. v. Morris et al., assignees*, 10 Johns. R. 524; *Waddington et als. v. Verdenburgh*, 2 Johns. Ch. R. 227; *Salmon v. Clagett*, 3 Bland's R. 173; *Farmers' Bk. of Reading v. Gibson*, 6 Barr's R. 51; and it has been held, that where the principal became insolvent, and made an assignment for the benefit of his creditors, previous to the payment by the surety, the surety was notwithstanding, entitled to full indemnification; *Haddens v. Chambers*, 2 Dal. R. 236; *McMullen v. The Bk. of Penn Town-ship*, 2 Barr's R. 343.

Not only is the surety who pays the debt of his principal, entitled to hold the position as to priority, which the original creditor occupied, but also to be subrogated to all the rights, privileges, or liens, which were enjoyed by the first creditor; *King v. Baldwin et al.*, 2 Johns. Ch. R. 554; *La Farge v. Herter et al.*, 11 Barb. Supre. C. R. 159; *McDaniels v. The Flower Brook Manufac. Co.*, 23 Vt. R. 274; *Goodyear v. Watson*, 14 Barb. Supre. R. 481; *Bradley et al. v. Spafford*, 3 Fost. R. 444; *N. Y. Savings Bk. v. Colcord*, 15 N. H. R. 119; *Foster v. The Trustees of the Athenæum*, 3 Alab. R. 310; *Lumpkin, adm'r, v. Mills*, 4 Geo. R. 343; *Perkins et als. v. Kershaw et als.*, 1 Hill's R. 351; *Burrows v. McWhann*, 1 Dess. R. 409; *Sprigg v. Braman*, 6 La. R. 59; *Cheeseborough v. Millard*, 1 Johns. Ch. R. 413; *Cuyler v. Ensworth*, 6 Paige's R. 32; *Ontario Bk. v. Walker et als.*, 1 Hill's (N. Y.) R. 652; *State Bk. v. Fletcher*, 5 Wend. R. 85; *Mathews v. Aikin*, 1 Comst. R. 599; and the surety, also, may, after payment, claim the benefit of all collaterals held by the

bond under seal of the debtor and his surety, the surety, having paid the debt, will become the simple contract creditor only of the principal

creditor to secure his debt; *McDaniels v. The Flower Brook Manufac. Co.*, 23 Vt. R. 274; In the matter of *Samuel H. Babcock*, 3 Story's R. 393; *N. Y. Savings Bk. v. Colcord*, 15 N. H. R. 119; *Foster v. The Trustees of the Athenæum*, 3 Alab. R. 310; *Lyon v. Leavitt et al.*, Id. 430; *Cullum v. Emanuel et al.*, 1 Id. 23; *Brown v. Lang et al.*, 4 Id. 53; *Hampton v. Levy*, 1 McCord's R. 112; *Worthington v. Ferguson*, 4 Har. & Johns. R. 522; *Tankersley v. Anderson*, 4 Dessaus. R. 44; *Miller v. Pendleton*, 4 Hen. & Munf. R. 436; *McDowell v. The Bk. of Wilmington and Brandywine*, 1 Harring. R. 369; *Bradford, adm'r, et al. v. Marvin et al.*, 2 Fla. R. 475; *Patterson v. Pope*, 5 Dana's R. 243; *Norton v. Soule*, 2 Maine R. 341; *Richardson v. The Washington Bk.*, 3 Mete. R. 540; *Green v. Kemp*, 18 Mass. R. 515; *Bowditch v. Green*, 3 Mete. R. 363; *Miller v. Woodward et al.*, adm'rs, 8 Misso. R. 169; *Crump et al. v. McMurtry*, Id. 408; *Elwood et al. v. Deifendorf et al.*, 5 Barb. Supre. C. R. 398; *Hodges v. Armstrong*, adm'r, 3 Dev. R. 253; *Kinley v. Hill*, 4 Wat. & Serg. R. 426; *Knox v. Moatz*, 3 Har. R. 74; *Erb's Ap.* 2 Pa. R. 298; *Cornwell's Ap.*, 7 Wat. & Serg. R. 398; *Lathrop's Ap.*, 1 Barr's R. 512; *Winebrenner's Ap.*, 7 Id. 333; *Pott v. Nathans*, 1 Wat. & Serg. R. 155; *Rittenhouse v. Levering*, 6 Id. 190; *Yard v. Patton*, 1 Har. R. 287; *Gossin v. Brown*, 1 Jones' 531; *Miller et al.*, assignees, *v. Ord*, exec., 2 Bin. R. 382; *Pride v. Boyce*, adm'r, *Rice's Eq.* R. 275; *Exec's of Gadsden v. Exec's of Lord*, 1 Dessau. R. 214; *Uzzel v. Mack*, 4 Hump. R. 319; and, it seems to be generally allowed in the American States, which have, in this respect, placed the doctrine of principal and surety on a wider and more liberal basis, than that prescribed by the law of England, that where the claim of the creditor is evidenced by bond, judgment, &c., the claim is not extinguished by the payment of the debt by the surety, but that it is still subsisting for his benefit, and he will be entitled to an assignment of the bond, judgment, or other evidence of the debt, or to deal with it, as if it were actually assigned to him, and enjoy from it all the advantages, which the original creditor could have attained; in some of the States this right has been conferred upon the surety by equitable adjudication, and in others, it is expressly given by statute; *Edgerly v. Emerson*, 3 Fost. R. 555; *Grove v. Brien*, 1 Md. R. 439; *Carroll, exec., v. Bowie*, 7 Gill's R. 34; *Goodyear v. Watson*, 14 Barb. Supre. C. R. 481; *McDowell v. The Bk. of Wilmington and Brandywine*, 1 Harring. R. 369; *Davenport v. Hardeman*, 5 Geo. R. 580; *Bailey v. Mizell*, 4 Id. 123; *Harris v. Wynne*, Id. 521; *Morris v. Evans et al.*, 2 B. Mon. R. 86; *Morris v. Page*, 9 Dana's R. 433; *Norton v. Soule*, 2 Maine R. 341; *Creager v. Brengle*, 5 Har. & Johns. R. 234; *Merryman et al. v. The State*, at the instance of *Harris*, Id. 423; *Colegate, &c., v. The Fredericktown Savings Institution, &c.*, 11 Id. 114; *Hollingsworth, adm'x, v. Floyd*, 2 Har. & Gill's R. 87; *Erb's Ap.*, 2 Pa. R. 298; *Gossin v. Brown*, 1 Jones' R. 532; *Croft v. Moore*, 9 Wat. R. 451; *Morris v. Oakford*, 9 Barr's R. 498; *Lathrop's Ap.*, 1 Id. 517; *Burns et al. v. The Huntingdon Bk.*, 1 Pa. R. 395; *Exec's of Gadsden v. Exec's of Lord*, 1 Dessau. R. 214; *Gunn et al. v. Tunnehill*, 2 Yerg. R. 244; *Floyds v. Goodwin*, 8 Id. 494; *Wade v. Green*, and *Green v. Wade*, 3 Hump. R. 547, and 558; *Robinson et al. v. Sherman et al.*, 2 Gratt. R. 181; *Powells's exec's, v. White et al.*, 11 Leigh's R. 309; but this last position is denied by several cases, favoring the English doctrine; *Foster v. The Trustees of the Athenæum*, 3 Alab. R. 310; *Morrison et al. v. Marvin*, 6 Id. 797; *Sanders et al. v. Watson et al.*, 14 Id. 198;

debtor; unless he should have taken the precaution to procure from such debtor a counter-bond for his own indemnity (z). The surety,

(z) *Copis v. Middleton*, Turn. & Russ. 224.

Uzzell v. Mack, 4 Hump. R. 319; *Miller v. Porter*, 5 Id. 298. Inasmuch, as the surety who pays the debt, is entitled to the benefit of all collaterals held by the creditor, it follows as a consequence, that the creditor is bound to take care of them, and if he parts with them, or they become impaired in value, by his own act, the surety will be discharged, either absolutely, or *pro tanto*, in proportion to the value of the security which has been lost; *Hayes v. Ward*, 4 Johns. Ch. R. 123; *Baker v. Briggs*, 8 Pick. R. 122; *Goodloe v. Clay*, 6 B. Mon. R. 236; *Ward v. Vass*, 7 Leigh's R. 135; *Payne v. The Commercial Bk.*, 6 Smed. & Mar. R. 24; *Neff's Ap.*, 9 Wat. & Serg. R. 36; *Everley v. Rice*, 8 Har. R. 297; *Holt v. Body*, 6 Id. 207; *Smith v. Day*, 23 Vt. R. 656; *N. Y. Savings Bk. v. Colcord*, 15 N. H. R. 119; *Pitts et al. v. Congdon*, 2 Comst. R. 352; and so where the creditor has it in his power to receive payment of the whole, or of a part of his debt, and neglects his opportunity, the surety will be, *pro tanto*, discharged; *Ramsay v. The Westmoreland Bk.*, 2 Pa. R. 203; *Commonwealth v. Miller*, 8 Serg. & Raw. R. 452; *Lichtenthaler v. Thompson*, 13 Id. 157; *Pipher v. Lodge*, 16 Id. 214; *Commonwealth v. Haas*, Id. 252; *Dixon v. Ewing*, 3 O. R. 230; *Carpenter v. Devon*, 6 Alab. R. 718; *Smeed v. White*, 3 J. J. Marsh. R. 525; *Givens v. Briscoe*, Id. 534; *Jones v. Bullock*, 3 Bibb's R. 467; *The Farmers' Bk. of Canton v. Reynolds*, 13 O. R. 84; *Baker v. Fordyce*, 9 Barr's R. 275; *Talmage v. Burlingame*, Id. 21; *Ferguson v. Turner*, 7 Misso. R. 497; *Curan v. Colbert*, 3 Geo. R. 239; *Brown v. Riggins*, 3 Id. 406; *The State Bk. v. Edwards et al.*, 20 Alab. R. 512; *Exec's of Riggins v. Brown*, 12 Geo. R. 273; *Everly v. Rice*, 8 Har. R. 297.

The fact that a surety has a right to look to his principal, for all payments made by

that surety on the principal's behalf, furnishes one of the reasons, why a contract made between the principal and creditor, to postpone the day of payment, (or other completion of the original agreement,) to which the surety is not a party, will discharge the surety from his liability; for, the creditor is bound to proceed against the principal at the desire of the surety, which is a privilege granted to the surety for his protection, and if, by his express agreement with the principal, the creditor is prevented from pursuing his remedy when requested, he is prevented from fulfilling his implied contract with the surety, who is thereby discharged, unless he be privy or consent to the new agreement: but see on this subject, *King v. Baldwin et al.*, 2 Johns. Ch. R. 554; *Brinager's adm'r. v. Phillips*, 1 B. Mon. R. 283; *United States v. Samuel and Jno. L. Howell*, 4 Wash. C. C. R. 620; *The Bk. of Steubenville v. Carroll et al.*, adm'rs, 5 O. R. 207; *The Trustees v. Miller*, 3 Id. 261; *Niblo v. Clark*, 3 Wend. R. 24, S. C. 6 Id. 236; *Bk. of Washington v. Barrington*, 2 Pa. R. 27; *Walrath v. Thompson*, 6 Hill's R. 540, S. C. 2 Comst. R. 185; *Birkhead v. Brown*, 5 Hill's R. 634; *Dobbin v. Bradley*, 17 Wend. R. 422; *Fellowes v. Prentiss*, 3 Denio's R. 512; *Hibbs v. Rue*, 4 Barr's R. 348; *Walsh v. Bailie*, 10 Johns. R. 180; *Wright v. Judson*, 8 Wend. R. 512; *Gifford v. Allen*, 3 Metc. R. 255; *Greely v. Dow*, 2 Id. 176; *Rathbone v. Warren*, 10 Johns. R. 587; *Crosby v. Wyatt*, 10 N. H. R. 318; *Hutchinson v. Moody*, 18 Maine R. 393; *Leavitt v. Savage*, 16 Id. 72; *Davis v. The People*, 3 Gilm. R. 409; *Comegys v. Booth*, 3 Stew. R. 14; *Inge v. The Branch Bk.*, 8 Pet. R. 108; *Clippenger v. Cripps*, 2 Wat. R. 45; *The Bk. of Steubenville v. Hoge*, 6 O. R. 17; *Wayne v. Kirby*, 2 Bail. R. 531; *Denis v. Reder*, 2 McCord's R. 451; *Reddish v. Watson*, 5 O. R. 510; *Baldwin*

however, will be entitled to the benefit of all collateral securities which the creditor, whom he has repaid, held for the debt; but he cannot

v. The Western Reserve Bk., Id. 273; *Hunter's adm'r. v. Jett*, 4 Rand. R. 104; Id. 26, S. C. 9 Wheat. R. 680; *United Dundas v. Sterling*, 4 Barr's R. 73; *Crosby v. Wyatt*, 10 N. H. R. 318; *The Stafford Bk. v. Crosby*, 8 Maine R. 191; *Blackstone Bk. v. Hill*, 10 Pick. R. 129; *Bagley v. Burzell*, 19 Maine R. 88; *Rhoads v. Frederick*, 8 Wat. R. 448; *Payne v. The Commercial Bk. of Natchez*, 6 Smed. & Mar. R. 24; *Wellington v. Gary*, 7 Id. 522; *Joslyn v. Smith*, 15 Vt. R. 353; *Waters v. Simpson*, 2 Gilm. R. 576; *Braman v. Hawk*, 1 Blackf. R. 392; *Cornson v. The State*, 4 Id. 241; *Horter v. Moore*, 5 Id. 367; *Parnell v. Price*, 3 Rich. R. 121; *Miller v. Stein*, 2 Barr's R. 286; *Munford v. The Overseers of the Poor*, 2 Rand. R. 313; *Harnsberger's exec., v. Geiger's adm'r*, 2 Gratt. R. 144; *Reynolds v. Ward*, 5 Wend. R. 501; *Bk. of Utica v. Ives*, 17 Id. 501; *McKinney's exec., v. Waller*, 4 Leigh's R. 434; *Alcock v. Hill*, 4 Id. 622; *Nichols v. Douglass*, 3 Misso. R. 49; *Tudor v. Goodloe*, 1 B. Mon. R. 322; *Anderson v. Manon*, 7 Id. 217; *Duncan v. Reid*, 8 Id. 382; *Pyle v. Bestock*, 10 Alab. R. 589, S. C. 11 Id. 256; *Vilas v. Pusey*, 1 Comst. R. 274; *Pyle v. Clark*, 3 B. Mon. R. 262; *Scott v. Hull*, 6 Id. 285; *Graves v. Graves*, Id. 213; *Mullin v. McCoan*, 7 Paige's R. 452; *Bangs v. Strong*, 11 Id. 11, S. C. 7 Hill's R. 250; *Huffman v. Hurlburt*, 13 Wend. R. 377; *Hallett v. Holmes*, 18 Johns. R. 28; *Fletcher v. Gamble*, 9 Alab. R. 335; *Bower v. Tiernan*, 3 Denio's R. 378; *Yancey v. Littlejohn*, 2 Hawk's R. 525; *Branch Bk. of Mobile v. James*, 9 Alab. R. 949; *Grafton Bk. v. Woodward*, 5 N. H. R. 99; *Bailey v. Adams*, 10 Id. 162; *Fowler v. Brooks*, 13 Id. 240; *McComb v. Keteridge*, 14 O. R. 348; *Spring v. The Bk. of Mount Pleasant*, 10 Pet. R. 257; *McLemore v. Powell et als.*, 12 Wheat. R. 554; *Bk. of the United States v. Hatch*, 6 Pet. R. 250; *United States v. The adm'rs of Hillegas*, 3 Wash. C. C. R. 70; *Miller v. Stewart*, 4 Id. 26, S. C. 9 Wheat. R. 680; *United States v. Tillotson et al.*, 1 Paine's C. C. R. 306; *Gass v. Stinson*, 2 Sumn. R. 453; *Suydam & Co. v. Vance*, 2 McL. R. 99; *The Seventh Ward Bk. v. Hanrick*, 2 Story's R. 416; *Low v. Underhill*, 3 McL. R. 376; *Musgrave et al. v. Glasgow*, 3 Port. (Inda) R. 31; *Cheek et al. v. Glass*, Id. 286; *Herbert v. Dumont et al.*, Id. 346; *Govan, exe'x, v. Binford*, 25 Missi. R. 151; *Thornton et al. v. Dobney*, 23 Id. 559; *Prescott v. Brinsley et al.*, 6 Cush. R. 233; *Mottram et als. v. Mills*, 2 Sandf. Supe. C. R. 189; *Wagman et als. v. Hoag*, 14 Barb. Supr. C. R. 232; *La Farge v. Herter et al.*, 11 Id. 159; *Turrill v. Boynton et als.*, 23 Vt. R. 142; *Whittle v. Skinner*, Id. 531; *Wadsworth et als. v. Allen, &c.*, 8 Gratt. R. 174. That the surety will be discharged, where he is injured by the creditor neglecting to proceed against the principal upon the surety's request, see the following cases: *Pain v. Packard et al.*, 13 Johns. R. 174; *King v. Baldwin et al.*, 17 Id. 384; *United States v. Simpson*, 3 Pa. R. 437; *Strader v. Houghton*, 9 Port. R. 334; *Towns v. Riddle*, 2 Alab. R. 694; *Cope v. Smith*, 8 Serg. & Raw. R. 110; *Gardner v. Ferree*, 15 Id. 28; *The Erie Bk. v. Gibson*, 1 Wat. R. 143; *Wilson v. Glover*, 3 Barr's R. 404; *Greenawalt v. Kreider*, Id. 264; *Wright v. Stockton*, 5 Leigh's R. 153; *Parrish v. Gray*, 1 Hump. R. 88; *Braman v. Honck*, 1 Blackf. R. 393; *Morland v. The State Bk.*, 1 Breese's R. 207; *Howard v. Brown*, 3 Gee. R. 523; *Bolton v. Lundy*, 6 Misso. R. 46; *Brice v. Edwards*, 1 Stew. R. 11; *Goodman v. Griffin*, 3 Id. 160; *Shehan v. Hampton*, 8 Id. 942; *Huffman v. Hurlbert*, 13 Wend. R. 377; *Herrick v. Borst*, 4 Hill's R. 650; *Beardsley v. Warner*, 6 Wend. R. 610, S. C. 8 Id. 194; *Beebee v. The West Branch Bk.*, 7 Wat. & Serg. R. 375; *Bellows v. Lovell*, 5 Pick. R. 307;

be entitled to the original bond executed by the debtor, because that is at an end by the very fact of the payment (a). In the words of

(a) *Turn. & Russ.* 231; *Dowbiggen v. Bourne*, 2 *You. & Coll.* 462; *Jones v. Davids*, 4 *Russ.* 277; *Caulfield v. Maguire*, 2 *Jones & Lat.* 164, 168.

Adams Bk. v. Anthony, 18 *Id.* 238; *Hubbard v. Davis*, 1 *Aiken's R.* 296; *Montpelier Bk. v. Dixon*, 4 *Vt. R.* 599; *Page v. Webster*, 15 *Maine R.* 249; *Mahurin v. Pearson*, 8 *N. H. R.* 539; *Pintard v. Davis*, 1 *Spencer's R.* 205; *Croughton v. Duval*, 3 *Call's R.* 61; *Denis v. Rider*, 2 *McL. R.* 451; *Jenkins v. Clark*, 7 *O. R.* 72; In the matter of *Sam'l. H. Babcock*, 3 *Story's R.* 393; *Overturf v. Martin*, 2 *Cart. (Inda.) R.* 507; *Wetzel v. Sponsler's exec's*, 6 *Har. R.* 460. But unless so requested, the creditor is not bound to proceed against the principal, and mere delay, or inaction on the part of the creditor in pursuing his remedy, will not discharge the surety; *King v. Baldwin et al.*, 2 *Johns. Ch. R.* 554; *Fulton v. Matthews*, 15 *Johns. R.* 433; *The People v. Russell*, 4 *Wend. R.* 570; *Hunt v. Bridgham*, 2 *Pick. R.* 581; *Jordan v. Trumbo*, 6 *Gill & Johns. R.* 103; *Sebley v. McAllaster*, 8 *N. H. R.* 389; *The Farmers' Bk. of Canton v. Reynolds*, 13 *O. R.* 84; *Haynes v. Corrington*, 9 *Sme. & Mar. R.* 470; *Anderson v. Menon*, 7 *B. Mon. R.* 217; *Johnson v. Searcy*, 4 *Yerg. R.* 182; *Dawson v. The Real Estate Bk.*, 5 *Ark. R.* 283; *Locke v. The United States*, 3 *Mas. R.* 446; *United States v. Hunt*, 1 *Gallis. R.* 32; *Townsend v. Riddle*, 2 *N. H. R.* 448; *Tudor v. Goodloe*, 3 *B. Mon. R.* 332; *Commercial Bk. v. French*, 21 *Pick. R.* 486; *Alcock v. Hill*, 4 *Leigh's R.* 622; *Harrison v. Lane*, 4 *Bibb's R.* 466; *Spring v. The Bk. of Mount Pleasant*, 10 *Pet. R.* 257; *Reynolds v. Ward*, 5 *Wend. R.* 501; *Norris v. Crummie*, 2 *Rand. R.* 328; *Hunter's adm'r v. Jelt*, 4 *Rand. R.* 104; *McKinney's exec. v. Waller*, 1 *Leigh's R.* 434; *Alcock v. Hill*, 4 *Id.* 622; *Lenox v. Prout*, 3 *Wheat. R.* 520; *Doe v. The Postmaster-General*, 1 *Pet. R.* 318; *Locke v. The Postmaster-General of the United States*, 3 *Mas. R.* 446; *Hunt v. The United*

States, 1 *Gallis. R.* 32; *Luke v. Leland et al.*, 6 *Cush. R.* 259; and some of the cases have gone so far as to decide, that after a judgment has been obtained by the creditor against the principal, and a writ of execution placed in the hands of the sheriff, a subsequent direction given to the sheriff not to proceed, will not discharge the surety, unless there has been a levy made on the property of the principal debtor; *Lennox v. Prout*, 3 *Wheat. R.* 520; *Sawyer v. Bradford*, 6 *Alab. R.* 572; *The Farmers' Bk. of Canton v. Reynolds*, 13 *O. R.* 84; *The Union Bk. of Tennessee v. Govan*, 10 *Smed. & Mar. R.* 333; *McKenney's exec's. v. Waller*, 1 *Leigh's R.* 434; *Morrison v. Hartman*, 2 *Har. R.* 55; *Creath's adm'r. v. Sims*, 5 *Haw. R.* 192; but if a levy has been made under the execution, a discontinuance of the proceedings by the creditor, will discharge the surety, because the creditor will have had it in his power to satisfy the debt; see *Exec's of Riggins v. Brown*, 12 *Geo. R.* 273; *The State Bk. v. Edwards et al.*, 20 *Alab. R.* 512; *Ferguson v. Turner*, 7 *Misso. R.* 497; *Jones v. Bulcock*, 3 *Bibb's R.* 467; *Lichtenthaler v. Thompson*, 13 *Serg. & Raw. R.* 157; and other cases above cited. Some of the authorities, however, deny the position, that mere inaction or delay on the part of the creditor, will not discharge the surety, the chief among which seem to be, *The People v. Jansen et als.*, 7 *Johns. R.* 332; *Pennimann et als. v. Hudson*, 14 *Barb. Supre. C. R.* 579; of which, the first has been overruled, and the last was a case of delay for seven months, without explanation, where the contract was "for a due and legal diligence."

It has been said, that where a valid contract is made between the creditor and principal, essentially changing the terms of the original contract, the surety will

Lord Brougham (*b*), the court admits the surety's right, as against the principal debtor, to stand in the shoes of the creditor, but says there are no shoes for him to stand in. If there should have been more than one surety, any one surety, paying the whole debt, is entitled, according to the general principles of justice, to contribution from his co-sureties in equal shares, or if they should have been sureties to unequal amounts, *then in proportion to the respective amounts to which they have made themselves liable (*c*) (1). And in [*105]

(*b*) *Hodgson v. Shaw*, 3 My. & Keen, 183, 194.

(*c*) *Deering v. Earl of Winchelsea*, 2 Bos. & Pul. 270, 272, 273; *Brown v. Lee*, 6 Barn. & Cress. 689; * S. C. 9 D. & R. 701.

be discharged, because among other considerations, the creditor disables himself from proceeding against the principal at the request of the surety, and consequently the surety is in danger of losing his chance of securing himself from loss, and so on the other hand, if the creditor informs the surety that he will not look to him for payment, the surety will be discharged; *Harris v. Brooks*, 21 Pick. R. 195; *Carpenter v. King*, 9 Metc. R. 511; *Bk. v. Kligen Smith*, 7 Wat. R. 523; *Hogeboom v. Herrick*, 4 Vt. R. 131; *Baker v. Briggs*, 8 Pick. R. 122; *Deyell v. Odell*, 3 Hill's R. 215.

But a mere naked agreement between creditor and principal, or a promise made to delay or give time, or to do any other thing changing essentially the original contract, if it be unsupported by a valid consideration, will not discharge the surety; *Wheeler et als. v. Washburn*, 21 Vt. R. 293; *Joslyn v. Smith*, 13 Id. 353; *Montgomery v. Dillingham*, 3 Smed. & Mar. R. 647; *Tudor v. Goodloe*, 1 B. Mon. R. 322; *Blackstone Bk. v. Hill*, 10 Pick. R. 129; *Bailey v. Adams*, 10 N. H. R. 162; *Wilson v. The Bk. of Orleans*, 9 Alab. R. 847; *The Oxford Bank v. Lewis*, 8 Pick. R. 458; *The Stafford Bk. v. Crosby*, 8 Maine R. 191; *Freeman's Bk. v. Rollins*, 13 Maine R. 202; *Crosby v. Wyatt*, 23 Id. 156; *Weakley v. Bell*, 9 Wat. R. 273; *Barker v. McClure*, 2 Blackf. R. 14; *Parmentell v. Price*, 3 Richard. R. 121; *Miller v. Stem*, 2 Barr's R. 286; *McLemore v. Powell et als.*, 12 Wheat. R. 554; *Bk. of*

United States v. Hatch, 6 Pet. R. 250; *Bk. of Utica v. Ives*, 17 Wend. R. 501; *United States v. Nicholl*, 12 Wheat. R. 505; *United States v. Kirkpatrick et als.*, 9 Id. 720; *Wagman et als. v. Hoag*, 14 Barb. Supre. C. R. 232; *Cromwell et al. adm'rs. v. Holly et al. execs.*, 5 Richard. L. R. 47.

When a judgment has been obtained by the creditor against the principal, the relations of principal, surety, and creditor, are not thereby altered; *The Commonwealth v. Miller*, 8 Serg. & Raw. R. 42; *Potts v. Nathans*, 1 Wat. & Serg. R. 155; *The Manufacturers' Bk. v. The Bk. of Penna.*, 7 Id. 335; *Talmage v. Burlingame*, 9 Barr's R. 21; *Newell v. Price*, 4 How. (Missi.) R. 684; *Cowan v. Colbert*, 3 Geo. R. 239; *Carpenter v. Devon*, 6 Alab. R. 710; *The Commercial Bk. v. The Western Reserve Bk.*, 11 O. R. 444; *La Farge v. Herter*, 3 Denio's R. 157, S. C. 11 Barb. Supre. C. R. 159; *Naylor v. Moody*, 3 Blackf. R. 93; *Deberry v. Adams*, 9 Yerg. R. 52; *Findlay's exec's v. The Bk. of the United States*, 2 McL. R. 44; *Bangs v. Strong*, 10 Paige's R. 11, S. C. 7 Hill's R. 250; *Boughton v. The Bk. of Orleans*, 2 Barb. Ch. R. 458; *Storms v. Thorn*, 3 Barb. Supre. C. R. 314; *Hubbell v. Carpenter*, 5 Id. 520.

On the subject of *Discharge of Surety*, see *American Leading Cases*, Volume Second, from page 242 to page 346, where the American authorities are collected.

(1) Where two are jointly bound, and

equity, if any surety has become insolvent, the others must contribute rateably to the payment of the whole debt (*d*). But if the surety has paid no more than his own proportion of the debt, he cannot obtain

(*d*) *Peter v. Rich*, 1 Cha. Rep. 34.

the liability of one of the joint promisors is subsequently destroyed, no acknowledgment of the claim by the other will revive the debt against the one so discharged; this is expressly decided in the case of *Levy v. Cadet et al.*, 17 Serg. & Raw. R. 126, in which the reason upon which this principle is founded, is set forth by Rogers, J., in the following words:—"To expose persons in such situations to the risk of being saddled with a debt at an indefinite length of time, which may have been discharged, by the acknowledgment of a person ignorant of the fact of payment, or from insolvency, or perhaps malice, reckless of consequences, is a principle which I am unwilling to sanction. Persons so exposed are those whom the statute was designed to protect." And so too in *Exeter Bank v. Sullivan et al.*, 6 N. H. R. 136, Richardson, C. J., remarks:—"It seems to be now become the general opinion, that an acknowledgment of a debt that will warrant the finding of a new promise, must be an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay. If the debt be admitted, but the debtor at the same time refuses to pay, no promise can be raised by implication. The acknowledgment, or new promise, is not deemed to be a continuance of the original promise, but a new contract supported by the original consideration, or evidence of such contract. This view of the operation of the acknowledgment of a debt, is believed to be conformable to the general current of the English, as well as of the American decisions, and has been explained and enforced, by Mr. J. Story, in a most able and satisfactory manner, 1 Pet. S. C. R. 351. If then, the admission of a debt does not, of itself, take

the case out of the statute, but is only evidence of a promise which may have that effect, the principle, that an acknowledgment by one joint-debtor will take a case out of the statute as to another, falls to the ground. There is nothing left to support it. For, although one joint-debtor may admit the fact of the existence of the debt, which admission will be evidence of that fact against another joint-debtor, still it by no means follows, that by such admissions, he can raise a new promise, that will bind another joint-debtor. It is not pretended that one can make a new contract, in such a case, that will bind the other."

The same doctrine is applicable to principal and surety, who, in the eye of the law, are regarded as joint promisors, although the liability of the surety may be of a secondary nature; and hence in *Boyd, exec. v. Grant et als.*, *exec's*, 13 Serg. & Raw. R. 124 (which was the case of an acknowledgment made by the executor of a surety, which was not regarded as sufficiently clear to take the case out of the statute), Tilghman, C. J., says:—"It is a circumstance of some weight, that George Grant was but an executor of his father, who was surety for Martin, and therefore could not be supposed to have the same knowledge of the bonds being paid or not, as if it had been his own debt. If payment had been made, it would probably have been by Martin, the principal debtor." And see further on this subject, *Zeart's exec's v. Heart*, 8 Barr's R. 341, where it is decided, that if the liability of one joint promisor, between whom the relation of principal and surety subsists, has been destroyed, no acknowledgment by the other will revive it.

contribution from any of the others (*e*); nor will contribution be allowed when the suretyship of one person is a distinct transaction from that of the others (*f*). A surety, however, may be discharged from his liability by the conduct of the creditor. As surety he has made himself liable only for the payment of a particular debt at a given time, or under certain given circumstances. If therefore the creditor, by any subsequent arrangement with the principal debtor, preclude himself from demanding payment of his debt at the time or under the circumstances originally agreed on, the surety will be at once discharged from all liability (*g*). Thus if the creditor bind himself to give further time for payment to the principal debtor (*h*), or compound with him, without expressly reserving his remedy against the surety (*i*) the surety will be discharged. But the acceptance by the creditor from the principal debtor of a new and independent security for *the debt will not discharge the surety (*k*). Neither [*106] will the surety be discharged by the mere neglect of the creditor to enforce payment of the debt from the principal debtor at the time of its becoming due (*l*); nor by the creditor's express agreement to give time to the principal debtor, if such agreement fail in any of the requisites of a binding contract (*m*).

We now approach the subject of the alienation of debts, to which some reference has already been made. We have seen that a debt was anciently considered as a mere right to bring an action against the debtor, and as such was incapable of being transferred (*n*.) In process of time however an assignment of a debt was permitted to take place by means of an authority from the creditor to his assignee to

(*e*) *Ex parte Gifford*, 6 Ves. 807; *Davies v. Humphreys*, 6 Me. & Wels. 153, 168 169.*

(*f*) *Coope v. Tynham*, T. & Russ. 426; *Craythorne v. Swinburne*, 14 Ves. 160; *Pendlebury v. Walker*, 4 You. & Col. 424.

(*g*) *Calvert v. London Dock Company*, 2 Keen, 638; *Heath v. Key*, 1 Y. & Jerv. 434; **Nicholson v. Revill*, 4 Ad. & Ell. 675, 683; **Blake v. White*, 1 You. & Coll. 420; *Bowser v. Cox*, 4 Beav. 379; 6 Beav. 110; and see *Squire v. Whitton*, 1 H. of L. Cases, 333.

(*h*) *Samuel v. Howarth*, 3 Meriv. 272; *Eyre v. Bartrop*, 3 Madd. 221; *Moss v. Hall*, 5 Ex. Rep. 46.*

(*i*) *Ex parte Gifford*, 6 Ves. 807; *Ex parte Carstairs*, Buck, 560; *Maltby v. Carstairs*, 7 Bar. & Cres. 737; **S. C.* 1 Man. & Ry. 549; *Thompson v. Lack*, 3 C. B. 540; *Owen v. Homan*, 13 Beav. 196.

(*k*) *Bell v. Banks*, 3 Man. & Gr. 258.*

(*l*) *Eyre v. Everett*, 2 Russ. 381; *Peel v. Tatlock*, 1 B. & P. 419.

(*m*) *Philpot v. Briant*, 4 Bing. 717.*

(*n*) *Ante*, p. 4.

sue the debtor in the creditor's name. This authority is usually called a *power of attorney*, which need not be by deed, but may be by writing unsealed (*o*), or even by parol (*p*); and when a debt is a *legal* debt, recoverable only in a court of law, it cannot be effectually assigned without such a power. The assignment of debts by means of powers of attorney is now recognized and protected by the courts of law (1). Thus in a case where the original creditor became bankrupt after he had assigned his debt, it was held that an action against the debtor might still be properly brought in the name of such original

(*o*) Howell v. M'Ivers, 4 T. R. 690.

(*p*) Heath v. Hall, 4 Taunt. 326.

(1) But that such a power will not be effectual in case of the death of the grantor of the power, see *Hunt v. Rousmanier*, 8 Wheat. R. 174, and 1 Pet. S. C. R. 1. The defendant, Rousmanier, executed to the plaintiff a power of attorney, authorizing him to make and execute a bill of sale of three-fourths of the vessels, *Nereus* and *Industry*, to himself or to any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them, and their freight; and in the power of attorney it was recited, that it was given as collateral security for the payment of certain notes, and was to be void on their payment; subsequently, Rousmanier died, and on the return of the vessels, they being taken possession of by the plaintiff, and the interest of the intestate in them offered for sale, the defendant's creditors forbade the sale, and this bill was brought to compel them to join. There was some evidence that the power had been given in place of a mortgage. At the first decision of this case Chief Justice Marshall, remarks, "The general rule * * is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act

which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law * * * Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death. * * * This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do *in the name of his principal* * * * This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death * * * It is, * * * deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death."

And in the same case reported in 1 Pet. S. C. R. 1, upon the question whether equity would grant relief, it was decided it would not, Judge Washington, delivering the opinion of the court.

creditor, by virtue of the power of attorney which he had given to his assignee; although, if no assignment had been made, the assignees of the creditor under the bankruptcy would have been *the proper parties to sue (*q*). So if a power of attorney be given on an assignment of a debt for a valuable consideration, it is held to be irrevocable by the assignor (*r*). When a debt or demand is *equitable* only, that is of a nature to be recoverable only in the Court of Chancery, it may be assigned without a power of attorney; for equity will allow the assignee to sue in his own name; and it is to be hoped that the privilege may one day be extended by parliament to the assignee of a legal debt. When a debt is assigned, the title of the assignee is not complete until he has given to the debtor notice of the assignment (*s*); for the debtor, if he has had no notice of the assignment may lawfully pay his debt to the original creditor, and will be effectually discharged by his receipt. [*107]

Bills of exchange and promissory notes are, as we have already seen (*t*), exceptions to the rule which requires a power of attorney to enable the assignee to sue the debtor for the debt assigned. The custom of merchants was in ancient times sufficiently powerful to countervail in this respect the strictness of the common law, and the holder of a bill of exchange was able to sue upon it in his own name. By a statute of Anne (*u*) promissory notes were made assignable or indorsable over in the same manner as inland bills of exchange might be according to the custom of merchants.

Debts being formerly considered as mere rights of action, could not be taken in execution on a judgment obtained against the creditor; neither can they now be *made available unless secured by some cheque, bill, note, bond, specialty or other security (*x*). [*108] But when they are so secured, the act for extending the remedies of creditors against the property of debtors (*y*), provides that under the writ of *feri facias* (*z*) the sheriff may seize not only money and bank notes, but also the securities above mentioned, and may sue upon

(*q*) *Winch v. Keeley*, 1 T. R. 619; *Parnham v. Hurst*, 8 Mee. & Wels. 743.*

(*r*) *Walsh v. Whitcomb*, 2 Esp. 565.

(*s*) See post, the chapter on Title.

(*t*) Ante, p. 4.

(*u*) Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25, s. 3.

(*x*) *Harrison v. Paynter*, 6 Mee. & Wels. 387; * *Wood v. Wood*, 4 Q. B. 397.*

(*y*) St. 1 & 2 Vict. c. 110, s. 12.

(*z*) See ante, p. 46.

them in his own name on the arrival of the time of payment; but the sheriff is not bound to sue unless indemnified in the manner prescribed by the act from the costs of the action (1).

In the event of bankruptcy or insolvency, the assignees of the bankrupt or insolvent are empowered to sue for debts owing to him in their own names for the benefit of his creditors (*a*).

We have now to consider the payment of debts. And in the first

(*a*) Stat. 12 & 13 Vict. c. 106, s. 141, repealing stats. 6 Geo. IV. c. 16, s. 63, and 1 & 2 Will. IV. c. 56, s. 25, as to bankruptcy; and 1 & 2 Vict. c. 110, s. 51; 7 & 8 Vict. c. 96, s. 13, as to insolvency. And see stat. 15 & 16 Vict. c. 76, s. 142, as to the bankruptcy or insolvency of a plaintiff in an action at law.

(1) In the United States, this subject is regulated by the legislative provisions of the several States. And not only may a debt due to a defendant be taken in satisfaction of his debt to the plaintiff, by an attachment in the nature of an execution; but a debt may also be attached by process of foreign attachment, as a means of compelling an appearance on the part of a defendant, or by domestic attachment which is of the general nature of a proceeding in bankruptcy. On the subjects, of foreign attachment, domestic attachment, or attachment in the nature of execution, see the following cases; *Bostwick et al. v. Beach*, 18 Alaba. R. 80; *Lawrence v. Sturdivent*, 5 Eng. R. 130; *The Stamford Bank v. Ferris*, 17 Conn. R. 259; *Davenport v. Lacon*, Id. 278; *Fitch v. Waite*, 5 Id. 117; *Grosvenor v. The Farmers' and Mechanics' Bank*, 13 Id. 107; *Insurance Co. v. Weeks et al.*, 7 Mass. R. 438; *Perry v. Coates et al.*, 9 Mass. R. 537; *Andrews v. Ludlow et al.*, 5 Pick. R. 28; *Lupton v. Cutler et al.*, 8 Id. 298; *Jackson v. Willard*, 4 Johns. R. 40; *Denton et al. v. Livingston et al.*, 9 Id. 96; *Hardy v. Dobbin*, 12 Id. 220; *Mann v. The exec's of Mann*, 1 Johns. Ch. R. 231; *Spencer v. Blaisdell*, 4 N. H. R. 196; *Insurance Co. v. Platt*, 5 Id. 193; *Rundlett v. Jordan*, 3 Greenlf. R. 47; *Belcher v. Grubb*, 4 Harring. R. 461; *Willis & Co. v. Parsons & Co.*, 13 Geo. R. 339; *Hodson et al. v. McConnel*, 12 Ill. R. 172; *Reinhard v. Keith*, 3 Inda. R. 137; *Burgess v. Clark*, Id. 250; *Wilson v. Albright*, 2 Iowa R. 125; *Harlan v. Moriarty*, Id. 486; *Cornett v. Doolittle*, Id. 385; *Weather v. Mudd*, 12 B. Mon. R. 112; *Woodruff & Co. v. French & Co. et al.*, 6 La. R. 62; *Estell v. Goodloe*, Id. 122; *Bird v. Cain et al.*, Id. 248; *Walker v. Curvey*, Id. 535; *Slatter v. Tiernan & Co.*, Id. 567; *Lumbden v. Bourie*, 2 Md. R. 324; *Barr, garnishee, v. Perry*, 3 Gill's R. 313; *Webb v. Miller et al.*, 24 Missi. R. 638; *Ridley v. Ridley*, Id. 648; *Gallis v. Kirby*, 13 Misso. R. 157; *Wood v. Edgar*, Id. 451; *Temple v. Cochran*, Id. 116; *Hanness v. Bonnell*, 3 Zabr. R. 159; *Castner v. Styer et al.*, Id. 236; *Bracken v. Ballentine*, 1 Harrison's R. 484; *Anderson v. Douk*, 10 Ired. L. R. 295; *Arrington v. Screws*, 9 Id. 42; *Myers v. Beeman*, Id. 116; *Weaver v. Russell et al.*, 18 O. R. 497; *Lessee of Cochran's Heirs v. Loring*, 17 Id. 409; *Fuller v. Bryan*, 8 Har. R. 144; *Sheetz v. Hobensack*, Id. 412; *Nichols v. Schofield*, 2 R. I. R. 123; *Arnold v. Frazier*, 5 Strobb. L. R. 33; *Lindau v. Arnold*, 4 Id. 290; *Kincaid v. Neall*, 3 McCord's R. 201; *Wiggins v. Anderson*, 1 Tex. R. 73; *Merrit et al. v. Clow*, 2 Id. 582; *Davis et al. v. Clayton et al.*, 5 Hump. R. 446; *Nolen v. Crook*, 5 Id. 312; *Hogshead v. Carruth*, 5 Yerg. R. 227; *Gibbs et al. v. Bourland*, 6 Id. 481; *The Brandon Iron Co. v. Cleason*, 24 Vt. R. 228; *Goodrich v. Church*, 20 Vt. R. 187; *Carrington et als v. Didier et als.*, 8 Gratt. R. 260; *Schofield v. Cox et als.*, Id. 533; *McCheury & Co. v. Jackson*, 6 Id. 96.

place, the payment of a smaller sum is no satisfaction of a larger one, unless there be some consideration for the relinquishment of the residue (*b*), such as the payment at an earlier time than the whole is due (*c*), or the concurrence of some (*d*) or all of the other creditors of the debtor in accepting a composition (*e*) (1). But it seems that

(*b*) *Cumber v. Wane*, 1 Strange, 425; S. C. 1 Smith's Leading Cases, 146; *Fitch v. Sutton*, 5 East, 230.

(*c*) Co. Litt. 212 b.

(*d*) *Norman v. Thompson*, 4 Ex. Rep. 755.*

(*e*) *Reay v. Richardson*, 2 Cro. Mee. & Rosc. 422.*

(1) It is a technical rule of law, that the giving of a less sum of money for a debt of greater amount, cannot operate in satisfaction or extinguishment of the debt; *Deterick v. Leman et als.*, 9 Johns. R. 333; *Harrison v. Wilcox et al.*, 2 Id. 448; *Johnson v. Brunnan*, 5 Id. 268; *Seymour v. Minturn*, 17 Id. 169; *Latapee v. Pecholier*, 2 Wash. C. C. R. 180; *White v. Jordan*, 27 Maine R. 370; *Warren v. Skinner*, 20 Conn. R. 559; *Eve v. Moseley*, 2 Strobh. R. 203; *Gurley v. Hiltshue*, 5 Gill's R. 218; *Spruneberger v. Dentlee*, 4 Wat. R. 126; *Kellogg et al. v. Dumont et al.*, 14 Wend. R. 116; *Brooks et al. v. White*, 2 Metcf. R. 283; *Molyneaux et al. v. Collier*, 13 Geo. R. 407; and so, a note for a less sum cannot be said to extinguish one of greater value; *Canfield v. Ives*, 18 Pick. R. 253; *Smith v. Bartholemew*, 1 Metcf. R. 276. But the delivery and acceptance of some collateral thing in satisfaction of a debt will be construed a valid payment; as the delivery and acceptance of commodities, *Jones v. Bullett*, 2 Litt. R. 49; or, of the promissory note of a third person, *Booth v. Smith*, 3 Wend. R. 66; *N. Y. State Bank v. Fletcher*, 5 Id. 85; *Bullen et al. v. McGillicuddy*, 2 Dana's R. 90; *Pope v. Tunstall et al.*, 3 Ark. R. 209; *James et al. v. Hackley et als.*, 16 Johns. R. 273; *Brown v. Jackson*, 2 Wash. C. C. R. 24; *Tobey v. Barber*, 5 Johns. R. 68; *Johnson v. Weed et al.*, 9 Id. 310; *Roget v. Merritt et al.*, 2 Caines' R. 117; *Van Epps v. Dilleye*, 6 Barb. Supre. C. R. 215; *Hays v. Stone*, 7 Hill's R. 128; *Maze*

v. Miller, 1 Wash. C. C. R. 328; *Harris et al. v. Lindsay*, 4 Id. 271; *Peter v. Beverly*, 10 Pet. R. 534; *Glenn v. Smith*, 2 Gill & Johns. R. 494; *Gordon v. Price*, 10 Ired. R. 385; *Perit et al. v. Pitfields et als.*, 5 Raw. R. 166; *McGuirn v. Holmes*, 2 Wat. R. 121; *McLaughlin v. Bovard*, 4 Id. 308; *Moore v. Briggs*, 15 Alaba. R. 21; *Fulford v. Johnston et al.*, Id. 386; *Frisbie et al. v. Larned et al.*, 21 Wend. R. 451; and so, of services rendered by the debtor, or real or personal property transferred to the creditor, or almost anything which the creditor shall agree to receive in satisfaction; *Blinn v. Chester*, 5 Day's R. 359; *Watkinson v. Ingleby et al.*, 5 Johns. R. 386; *Eaton v. Lincoln*, 13 Mass. R. 424; *Musgrove v. Gibbs*, 1 Dal. R. 216; *Smith v. Brown*, 3 Hawks' R. 580; *Brooks et al. v. White*, 2 Metcf. R. 283; *Austin v. Dorwin*, 21 Vt. R. 39; *Spann v. Blatzell*, 2 Fla. R. 302; *Milliken et al. v. Brown*, 1 Raw. R. 391.

So upon the principle of an accord and satisfaction where an agreement is made between the parties, whereby some advantage accrues to the creditor, or detriment to the debtor, other than what springs out of the original contract, a less sum may be received in satisfaction of a greater; *Milliken et al. v. Brown*, 1 Raw. R. 391; *Molyneaux et al. v. Collier*, 13 Geo. R. 407; *Henderson v. Moore*, 5 Cranch's R. 11; or, a note for a less sum, extinguish a debt of greater amount; *Brooks et al. v. White*, 2 Metcf. R. 283; *Boyd et al. v. Hitchcock*, 20 Johns. R. 76; *Le Page v.*

the acceptance of a *negotiable security* for a small amount may be a good satisfaction for a larger *debt (*f*); and the payment of a small [*109] sum may be a good satisfaction for an unliquidated demand for

(*f*) *Sibree v. Tripp*, 15 Mee. & Wels. 23.*

McCrea, 1 Wend. R. 164; *Kellogg et al. v. Dumont et al.*, 14 Id. 116; *Sanders v. The Branch Bank*, 13 Alaba. R. 353; and hence it follows that an agreement for the payment of a sum certain, instead of a larger and unliquidated claim, will cancel the indebtedness; *McDaniels v. Lapham et al.*, 21 Vt. R. 223; *Lamb v. Goodwin*, 10 Ired. R. 320, and the acceptance of the note of one of the partners of a firm, for the debt of a firm, is valid as an accord and satisfaction; *Sheeby v. Mandeville et al.*, 6 Cranch's R. 253; *Est. of Davis v. Desauque*, 5 Whart. R. 531; *Muldon v. Whitlock*, 1 Cow. R. 290; *Parker v. Cousins*, 2 Gratt. R. 373; *Mason v. Wickersham*, 4 Wat. & Serg. R. 100; *Arnold v. Camp*, 12 Johns. R. 409; *James v. Hackley*, 16 Id. 273; *Harris et al. v. Lindsay*, 4 Wash. C. R. 271; *Wildes et al. v. Fessenden et als.*, 4 Metc. R. 12; *Livingston v. Radcliff*, 6 Barb. Supre. C. R. 202; *Van Epps v. Dilleye*, Id. 215; *Kinster et al. v. Pope*, 5 Strobb. R. 126. But in all cases of accord and satisfaction, the consideration therefore, must be either good or valuable; *Keeler v. Neal*, 4 Wat. R. 424; *Davis v. Noaks*, 3 J. J. Marsh. R. 494; *Commw. for the use, &c., v. Miller*, 5 Mon. R. 205; *Nave v. Fletcher*, 4 Litt. R. 242; *Buddicum v. Kirk*, 3 Cranch's R. 293.

An accord, however, without a satisfaction, is of no efficacy, and hence an agreement for an accord will not be binding unless executed; *Williams v. Stanton*, 1 Root's R. 426; *Pope v. Tunstale et al.*, 3 Ark. R. 209; *Linard v. Patterson*, 3 Blackf. R. 354; *Maze v. Miller*, 1 Wash. C. C. R. 328; *Morris Canal v. Van Vorst*, 1 Zab. R. 101; *Russell v. Lytle*, 6 Wend. R. 390; *Hawley v. Foot*, 19 Id. 516; *Brooklyn Bank v. De Grann et als.*, 23 Id. 342; *Anderson v. The Highland Turnpike Co.*, 16 Johns. R. 86; *Evans*

v. Wells, 22 Wend. R. 325; *Eaton v. Lincoln*, 13 Mass. R. 424; *Seamen v. Haskins*, 2 Johns. Cas. 195; *Phillips v. Berger*, 2 Barb. Supre. C. R. 609; *Spruneberger v. Dentler*, 4 Wat. R. 126; *Rising v. Patterson*, 5 Whart. R. 316; *Daniels v. Hatch et al.*, 1 Zab. R. 391; *Hart v. Bailie*, 16 Serg. & Raw. R. 162; *Weakley v. Bell*, 9 Wat. R. 280; *Phelps v. Johnson*, 8 Johns. R. 58; *Gregory v. Thomas*, 2 Wend. R. 47; *Gallagher's exec's v. Roberts*, 2 Wash. C. C. R. 191; but if, by agreement, an executory obligation be entered into in lieu of payment, it will be good if the obligation is carried out; *Kinsler et al. v. Pope*, 5 Strobb. R. 126; *Spann v. Blatzell*, 2 Fla. R. 302; *Morris Canal v. Van Voret*, 1 Zab. R. 391.

Upon the question whether the debtor's own negotiable note, can be taken as an accord and satisfaction of his debt the authorities seem to be conflicting; in New York, it has been held, that it cannot be regarded as a satisfaction of the debt, even upon an express agreement of the parties; *Putnam v. Lewis*, 8 Johns. R. 389; *Frisbie v. Larned*, 21 Wend. R. 450; *Myers v. Welles*, 5 Hill's R. 463; *Cole v. Sackett*, 1 Hill's (N. Y.) R. 517; but, in Pennsylvania, Connecticut and New Hampshire, the law is to the contrary; *Dougal v. Cowles et al.*, 5 Day's R. 511; *Darlington v. Gray*, 5 Whart. R. 487; *Weakley v. Bell et al.*, 9 Wat. R. 273; *Hays v. Clurg*, 4 Id. 452; *Jeffrey v. Cornish*, 10 N. H. R. 505; with a like clashing of authorities, some of the cases hold that the debtor's own negotiable note cannot be regarded as payment; *Herring v. Sanger*, 3 Johns. Cas. 71; *Johnson v. Weed*, 9 Johns. R. 310; *Olcott v. Rathbone*, 5 Wend. R. 490; *Hays v. Stone*, 7 Hill's R. 128; *Jeffrey v. Cornish*, 10 N. H. R. 505; *Elliott v. Sleeper*, 2 Id. 525; *Maze v. Miller*, 1 Wash. C. C. R. 328; *Gallagher's exec's v. Roberts*, 2 Id. 191; *Harris*

large pecuniary damages, on account of the uncertainty of such a claim (*g*). When a less sum is paid to the creditor than the whole amount of his demands, it is competent to the debtor to make the payment in

(*g*) *Wilkinson v. Byers*, 1 Ad. & Ell. 106.*

v. Lindsay, 4 Id. 271; *Peter v. Beverly*, 10 Pet. R. 532; *Schemerhoin v. Loines*, 7 Johns. R. 311; *Gilead v. Smith*, 2 Gill & Johns. R. 494; *Bito v. Porter*, 9 Conn. R. 23; *Perit v. Pitfield*, 5 Raw. R. 166; *Tyson v. Pollock*, 1 Penna. R. 375; *McGinn v. Holmes*, 2 Wat. R. 121; *Risley v. Buchanan*, 5 Id. 118; *McLughan v. Bovard*, 4 Id. 308; *Costelo v. Cave*, 2 Hill's (S. C.) R. 528; *Chesturn v. Johnson*, 2 Bailey's R. 574; *Prescott v. Hubbell*, 1 McCord's R. 94; *Spear v. Atkinson*, 1 Ired. R. 262; *Watson v. Owens*, 1 Richard. R. 111; *Weed v. Snow*, 3 McL. R. 262; *Gardiner v. Gorham*, 1 Doug. R. 507; *Steamboat Charlotte v. Hammond*, 9 Misso. R. 59; while others support the principle that, the legal presumption, if uncontradicted, is, that the note was intended 'as a payment for the debt, for otherwise the debtor might be compelled to pay his debt twice; *Johnson v. Johnson*, 11 Mass. R. 359; *Thatcher et als. v. Dinsmore*, 5 Id. 299; *Varner v. The Inhabitants of Nobleborough*, 2 Greenlf. R. 121; *Butts v. Dean*, 2 Metcf. R. 76; *Wallace v. Agry et al.*, 5 Mason's R. 327; *Descandilla et al. v. Harris*, 8 Greenlf. R. 298; *Ilisley v. Jewett*, 2 Metcf. R. 168; *Holmes v. De Camp*, 1 Johns. R. 34; *Pintard v. Tackington*, 10 Id. 104; *Maneely v. McGee*, 6 Mass. R. 143; *Reed v. Upton*, 10 Pick. R. 522; *Jones v. Kennedy*, 11 Id. 125; *Watkins v. Hill*, 8 Id. 522; *Cummings v. Hackley*, 8 Johns. R. 202; *Comstock v. Smith*, 10 Shepl. R. 202; *Dogan v. Ashbey*, 1 Richard. R. 36; *Fowler v. Bush*, 21 Pick. R. 230; *French v. Price*, 24 Id. 13; *Hutchins v. Olcott*, 4 Vt. R. 549; *Torrey v. Baxter*, 13 Id. 452; *Homes v. Smith*, 16 Maine R. 177; *Wise v. Hilton*, 4 Id. 435; *Curtis v. Hubbard*, 9 Metcf. R. 322; *Gilmore v. Bussy*, 12 Id. 418; *Follett v. Smith*, 16 Vt. R. 30; but, where the note has been negotiated by the creditor, no action can be brought on the original debt, unless the note is produced, or accounted for; *Small v. Jones*, 8 Wat. R. 265; *Hughes v. Wheeler*, 8 Cow. R. 77; *Dayton v. Trull*, 23 Wend. R. 345; *Hays v. McClung*, 4 Wat. R. 452; *Harris v. Johnston*, 3 Cranch's R. 311; *McConnell et al. v. Stettinius et al.*, 2 Gilm. R. 707; *Cocke v. Chancy, adm'r*, 14 Alaba. R. 65; *Spear v. Atkinson*, 1 Ired. R. 262; *Shaw v. Gorkin*, 7 N. H. R. 16; *Holmes v. DeCamp*, 1 Johns. R. 34; *Burdick v. Given*, 15 Id. 247; *Humphreys v. Wheeler*, 8 Cow. R. 77; *Bite v. Porter*, 9 Conn. R. 23.

The New York cases of *Cumming v. Hackley*, 8 Johns. R. 202, *Tobey v. Barber*, 5 Id. 68, and *Hour v. Clute*, 15 Id. 224, which seem to lead to the conclusion that a creditor, may, by agreement, receive the debtor's own security, not negotiable, in satisfaction of the debt, cannot easily be reconciled with the decisions in *Putnam v. Lewis*, 8 Johns. R. 389, *Frisbie v. Larned*, 21 Wend. R. 450, *Myers v. Welles*, 5 Hill's R. 463, and *Cole v. Sockett*, 1 Hill's (N. Y.) R. 517, before referred to.

A check which has been taken as payment will cancel the debt; *Barnard v. Graves*, 16 Pick. R. 41; *Dennie v. Hart*, 2 Id. 204; *Franklin v. Vanderpool*, 1 Hall's (N. Y.) R. 78; but the presumption of law is, that a check is only payment when realized; *Cromwell v. Lovett*, 1 Hall's (N. Y.) R. 56; *The People v. Howell*, 4 Johns. R. 296; *Olcott v. Rathbone*, 5 Wend. R. 490; *Downey, exec., v. Hicks, exe'x*, 14 How. R. 240; *Okie v. Spencer*, 2 Whart. R. 253; and, of course a note or check is but a conditional payment, when it is expressed to be in full, if, or when paid; *Herring v. Sanger*, 3 Johns. Cas. 71; *Tyson et als. v. Pollock*, 1 Penna. R. 375; *Chapman v. Steinmetz*, 1 Dal. R. 261; *Okie v.*

satisfaction of any demand he may please, and the creditor must appropriate the payment accordingly (*h*); but if the payment be made generally without any express appropriation, the creditor may elect, at the time of payment (*i*), or within a reasonable time after (*k*), to appropriate the money to whichever demand he may please. And if no election as to the appropriation of the payment should be made on either side, the law will, in ordinary cases of current accounts, presume that the first item on the debit side is discharged or reduced by the first payment entered on the credit side, and so on in the order of time (*l*) (1). When the debt carries interest, the payment is considered

(*h*) *Shaw v. Picton*, 4 Barn. & Cress. 715.*

(*i*) *Devaynes v. Noble*, 1 Mer. 604.

(*k*) *Simson v. Ingham*, 2 Barn. & Cress. 65.*

(*l*) 1 Meriv. 608; *Williams v. Rawlinson*, 10 J. B. Moore, 362.

Spencer, 2 Whart. R. 253; *Proctor v Mather*, 3 B. Mon. R. 353.

The acceptance of a higher security for the same debt, will, as a general thing, extinguish an inferior security; *Green v. Sarmiento*, 1 Pet. C. C. R. 74; *Butler v. Miller*, 1 Denio's R. 407; *Carson v. Monteiro*, 2 Johns. R. 308; *Pleasants v. Meng et al.*, 1 Dal. R. 380; *United States v. Price*, 9 How. R. 83; *Willings et al. v. Consequa*, 1 Pet. C. C. R. 393; *Ward v. Johnson*, 13 Mass. R. 140; *Robertson v. Smith et als.*, 18 Johns. R. 459; *Peters v. Sandford*, 1 Denio's R. 224; *Penny v. Martin et als.*, 4 Johns. Ch. R. 566; *Averill v. Locks*, 6 Barb. Supre. C. R. 20; *Sloo v. Lea*, 18 O. R. 279; *Ferrall et al. v. Bradford*, 2 Fla. R. 508; *Smith et al. v. Black*, 9 Serg. & Raw. R. 142; *Lewis v. Williams*, 6 Whart. R. 264; *Anderson v. Levan*, 1 Wat. & Serg. R. 334; but, both the securities must be between the same parties; *Day et al. v. Seal et al.*, 14 Johns. R. 404; *Axers, exe'x, v. Musselman*, 2 Browne's R. 11; *Beale v. The Bank*, 5 Wat. R. 529; *Wolf v. Wyeth*, 11 Serg. & Raw. R. 149; *Davis v. Anable et al.*, 2 Hill's (N. Y.) R. 339.

And in all cases where the instrument is between the same parties, and for the same sum as the former security, the general course of business, as well as the presumption of fact, would seem to imply that the more recent security extinguishes the

older; *Slaymaker v. Gundacker's exec's*, 10 Serg. & Raw. R. 75; *Bank of the United States v. Daniels*, 12 Pet. R. 14; *Castleman v. Holmes*, 4 J. J. Marsh. R. 1; *Stewart's Appeal*, 3 Wat. & Serg. R. 476; *Frisbie v. Larned*, 21 Wend. R. 450; *Butler v. Miller*, 1 Denio's R. 407; *Gardner v. Hust*, 2 Richard R. 601. Thus, the giving of a new note for an old one, is equivalent to a payment of the latter; *Cornwall v. Gould*, 4 Pick. R. 444; *Huse v. Alexander*, 2 Metef. R. 157; and so of a bond; *Morrison v. Berkey*, 7 Serg. & Raw. R. 238; *Hamilton, exec., v. Collender's exec's*, 1 Dal. R. 420; *Gregory v. Thomas*, 20 Wend. R. 17. This, however, is a question to be determined by the intention of the parties; *United States v. Lyman*, 1 Mason's R. 482; *Van Vleet et al. v. Jones et al.*, *Spencer's R.* 341; *Wallace v. Farman*, 4 Wat. R. 378; and that intention in doubtful cases may be ascertained by the intervention of a jury; *Hart v. Boller*, 15 Serg. & Raw. R. 162; *Jones v. Shawhan*, 4 Wat. & Serg. R. 257; *Musgrove v. Gibbs*, 1 Dal. R. 216; *Hacker et als. v. Perkins*, 5 Whart. R. 95; *Porter v. Talcot et al.*, 1 Cow. R. 359; *Bank of the Commonwealth v. Letcher*, 3 J. J. Marsh. R. 195; *Downey v. Hicks*, 14 How. R. 240.

(1) The doctrine stated in the text is the law of this country; for, where a debtor, being liable to his creditor on

to be applied in the first place in discharge of the interest then due, and the surplus, if any, in discharge *pro tanto* of the principal. For

more than one account, makes a voluntary partial payment, he has a right to apply it to what debt he pleases; *Speck v. The Commonwealth*, 3 Wat. & Serg. R. 328; *Berghaus v. Alter*, 9 Wat. R. 387; *The Mayor and Commonalty of Alexandria v. Patten et als.*, 4 Cranch's R. 317; *Field et als. v. Holland et als.*, 6 Id. 8; *Bosley v. Porter*, 4 J. J. Marsh. R. 621; *Hall et al. v. Constant*, 2 Hall's R. 185; *McDonald v. Pickett*, 2 Bail. R. 617; *Black v. Schooler*, 2 McC. R. 293; *Bonaffé v. Woodbury*, 12 Pick. R. 456; *Hussey v. The Manufacturers' and Mechanics' Bank*, 10 Id. 415; *Martin v. Draher*, 5 Wat. R. 544; *Moorehead v. The West Branch Bank*, 3 Wat. & Serg. R. 550; *Boutwell v. Mason et al.*, 12 Vt. R. 608; *Randall v. Parramore et al.*, 1 Fla. R. 410; *Reed v. Boardman*, 20 Pick. R. 441; *Pindall's exe'x, v. The Bank of Marietta*, 10 Leigh's R. 481; *Miller v. Trevilian*, 2 Rob. (Va.) R. 2; *Jackson v. Bailey*, 12 Illo. R. 159; *McTavish et al. v. Carroll*, 1 Md. Ch. Decisions, 160; *Treadwell v. Moore*, 34 Maine R. 112; *Caldwell v. Wentworth*, 14 N. H. R. 431; and, if the debtor does not make the application, the creditor may; *Speck v. The Commonwealth*, 3 Wat. & Serg. R. 328; *Berghaus v. Alter*, 9 Wat. R. 387; *The Mayor and Commonalty of Alexandria v. Patten et als.*, 4 Cranch's R. 317; *Fields et als. v. Holland et als.*, 6 Id. 8; *Mann v. Marsh*, 2 Caines' R. 99; *Reynolds et al. v. McFarlane*, *Overton's R.* 488; *Arnold v. Johnson*, 1 Scam. R. 196; *McFarland et al. v. Lewis et al.*, 2 Id. 345; *Hillyer v. Vaughan*, 1 J. J. Marsh. R. 583; *Briggs v. Williams et al.*, 2 Vt. R. 283; *Rossian et al. v. Call et al.*, 14 Id. 83; *Selleck v. The Sugar Hollow Turnpike Co.*, 13 Conn. R. 453; *Rackley v. Pearce*, 1 Kelly's R. 241; *Sturges et al. v. Robbins*, 7 Mass. R. 301; *Brewer v. Knapp et al.*, 1 Pick. R. 332; *Logan v. Mason*, 6 Wat. & Serg. R. 9; *The Stamford Bank v. Benedict*, 15 Conn. R. 438; *Mitchell v. Dall*, 4 Gill & Johns. R. 361; *Clark et al. v. Burdett*, 2 Hall's R. 197; *Van Rensselaer's Exec's v. Roberts*, 5 Denio's R. 470; *Hamilton v. Benbury*, 2 Hayw. R. 385; *Niagara Bank v. Roosevelt*, 9 Cow. R. 409; *Taylor et al. v. Jones*, 1 Cart. R. 17; *McTavish et al. v. Carroll*, 1 Md. Ch. Decisions, 160; *Sawyer, adm'r, v. Tappan*, 14 N. H. R. 352; *Caldwell v. Wentworth*, Id. 431; but, where neither debtor nor creditor makes an appropriation, the court will do it for them; *Speck v. The Commonwealth*, 3 Wat. & Serg. R. 328; *Berghaus v. Alter*, 9 Wat. R. 387; *Fields et als. v. Holland et als.*, 6 Cranch's R. 8; *Cremer v. Higginson*, 1 Mas. R. 338; *McTavish et al. v. Carroll*, 1 Md. Ch. Decisions, 160; *Caldwell v. Wentworth*, 14 N. H. R. 431.

The intention of the debtor to appropriate a payment, may, however, be indicated by the circumstances of the case, as well as by an express direction; *Taylor v. Sandiford*, 7 Wheat. R. 14; *Mitchell v. Dall*, 2 Har. & Gill's R. 160, S. C. 4 Gill & Johns. R. 361; *Fouke v. Bowie*, 4 Har. & Johns. R. 566; *Robert et als. v. Garnie*, 3 Caines' R. 14; *West Branch Bank v. Moorehead*, 5 Wat. & Serg. R. 542; *Dickinson College v. Church*, 1 Id. 462; *Schnell v. Schroder*, *Bailey's Eq.* 335; *Scott v. Fisher*, 4 Mon. R. 387; *Stone v. Seymour*, 8 Wend. R. 404, S. C. 15 Id. 19; and so of the intention of the creditor; *Starrett v. Barber*, 20 Maine R. 457; *Allen v. Kimball*, 23 Pick. R. 473; *Upham et als. v. Lefavour*, 11 Metcf. R. 174; *Allen v. Culver*, 3 Denio's R. 285; *Lindsey v. Steven*, 5 Dana's R. 104; and consequently, the discretionary power of the court to appropriate a payment not expressly applied by either debtor or creditor, is to be controlled by the intention of the parties as determined by all the circumstances of the case; *Emery v. Tichout*,

no creditor would apply any payment to the discharge of part of the principal, which carries interest, instead of to the discharge of interest, for which, when due, no further interest is payable (*m*).

(*m*) *Bower v. Marris*, 1 Cr. & Phi. 351, 355.

13 Vt. R. 15; *Robinson et al. v. Doolittle et al.*, 12 Id. 246; *Hillyer v. Vaughan*, 1 J. J. Marsh. R. 583; *The Stamford Bank v. Benedict*, 15 Conn. R. 438; *Cheston v. Wheelright*, Id. 562; *Portland Bank v. Brown*, 22 Maine R. 295; *Smith v. Lloyd*, 11 Leigh's R. 512; *Caldwell v. Wentworth*, 14 N. H. R. 431. Thus, in cases of running accounts, payments are to be applied to the debts antecedently incurred, in order of time; *Speck v. The Commonwealth*, 3 Wat. & Serg. R. 328; *Berghaus v. Alter*, 9 Wat. R. 387; *United States v. Kirkpatrick et als.*, 9 Wheat. R. 720; *Jones v. The United States*, 7 How. R. 681; *Boody et als. v. The United States*, 1 Woodbury & Minot's R. 151; *Postmaster General v. Furber*, 4 Mas. R. 333; *United States v. Wardwell et al.*, 3 Id. 82; *Gass v. Stinson*, 3 Sumn. R. 99; *McKenzie v. Nevins*, 22 Maine R. 138; *Miller v. Miller*, 23 Id. 22; *Smith v. Lloyd*, 11 Leigh's R. 512; *Fairchild v. Holly*, 10 Conn. R. 176; *Allen v. Culver*, 3 Denio's R. 285; *Ross's exec. v. McLaughlan's adm'r, et als.*, 7 Gratt. R. 86; but see exceptions to this rule, in the case of collectors of taxes; *United States v. Patterson*, 7 Cranch. R. 572; *Jones v. The United States*, 7 How. R. 681; *Seymour v. Van Slyck*, 8 Wend. R. 404; *Stone v. Seymour*, 15 Id. 19; *Postmaster v. Norvell*, Gilpin's R. 107. So, where there are two debts, one bearing interest, and the other not, the payment is to be appropriated to the debt bearing interest; *Gwinn v. Whitaker*, 1 Har. & Johns. R. 754; *Dorsey v. Gassaway*, 2 Id. 402; *Bacon v. Brown*, 1 Bibb's R. 334; *Beauton v. Rice*, 5 Mon. R. 253; *McTavish et al. v. Carroll*, 1 Md. Ch. Decisions, 160. And a payment must be applied to a debt due, rather than to one not due; *McDowell The Blackstone Canal Co.*, 5 Mas. R. 11; *Baker v. Stackhoole*, 9 Cow. R. 420; *Bacon v. Brown*, 1 Bibb's R. 334; *Stone v. Seymour*, 15 Wend. R. 19; *Upham et als. v. Lefavour*, 11 Metcf. R. 174; *Lebleu v. Rutherford et als.*, 9 Robins. R. 95; *Fol-lain et als. v. Orillion*, Id. 506; *Treadwell v. Moore*, 34 Maine R. 112; *Caldwell v. Wentworth*, 14 N. H. R. 431; and to a several, in preference to a joint debt; *Livermore v. Claridge*, 33 Maine R. 428. So, again, the appropriation by the court, in the case of two debts, one of which is secured, and the other not, must be made to the debt not secured, or if both debts are secured, then to the one of which the security is most precarious; *Field et als. v. Holland et als.*, 6 Cranch's R. 8; *Mer-rimack Co. Bank v. Brown*, 12 N. H. R. 321; *Portland Bank v. Brown*, 22 Maine R. 295; *Niagara Bank v. Roosevelt*, 9 Cow. R. 410; *Newman v. Meek*, 1 Smed. & Mar. R. 331; *Hammer's adm'r, v. Rochester*, 2 J. J. Marsh. R. 144; *Blanton v. Rice*, 5 Mon. R. 253; *Smith v. Lloyd*, 11 Leigh's R. 512; *The Stamford Bank v. Benedict*, 15 Conn. R. 438; *Cheston v. Wheelright*, Id. 562; *Vance v. Monroe*, 4 Gratt. R. 53; *Upham et als. v. Lefavour*, 11 Metcf. R. 174; *The Ordinary v. McCollum*, 3 Strobb. R. 494; *Backhouse et als. v. Patton et als.*, 5 Pet. R. 161; *Briggs v. Williams et als.*, 2 Vt. R. 283; *Emery v. Tichout*, 13 Id. 15; *Hilton v. Burley*, 2 N. H. R. 193; *Blackstone Bank v. Hill*, 10 Pick. R. 129; *Capen v. Alden*, 5 Metcf. R. 268; *Jones v. Kilgore*, 2 Richard. Eq. R. 64; *McTavish et al. v. Carroll*, 1 Md. Ch. Decisions, 160; but see to the contrary, *Gwinn v. Whitaker*, 1 Har. & Johns. R. 754; *Dorsey v. Gassaway*, 2 Id. 402; *Pattison v. Hall*, 9 Cow. R. 747; *Robinson et al. v. Doolittle et al.*, 12 Vt. R. 246. In accordance, also, with this doctrine, a partial payment unapprop-

When a person becomes so embarrassed as to be unable to pay all his debts in full, he usually endeavours to enter into a composition with his creditors, prevailing on *them to accept so much in the pound, and to allow a given time for payment. In this case a *letter of license* is generally given by the creditors, by which they covenant not to take any proceedings for their debts in the meantime; and this license is frequently embodied in a *deed of*

priated by either party, must be applied to the interest rather than to the principal of the debt; *Spires v. Hamot*, 8 Wat. & Serg. R. 17; *Commonwealth for the use, &c., v. Vanderslice et al.*, adm'rs, 8 Serg. & Raw. R. 425; *Smith v. Adm'x of Shaw*, 2 Wash. C. C. R. 167; *Tracey v. Wikoff*, 1 Dal. R. 124; *Primrose v. Hart*, Id. 378; *Steele v. Taylor*, 4 Dana's R. 445; *Story v. Livingston*, 13 Pet. R. 360; *The United States v. McLemore*, 4 How. R. 286; *Dean v. Williams*, 17 Mass. R. 417; *Commonwealth v. Miller's adm'rs.*, 8 Serg. & Raw. R. 452; *Gwinn v. Whitaker*, 1 Har. & Johns. R. 754; *Frazier v. Hyland*, Id. 98; *Jones v. Ward*, 10 Yerg. R. 161; *Guthrie et al. v. Wickliffe*, 1 Marsh. R. 584; *Hart v. Derman*, 2 Florid. R. 445; *The Union Bank of La. v. Kindrick*, 10 Rob. R. 51; *Williams v. Houghtaling*, 3 Cow. R. 87; *Stoughton v. Lynch*, 2 Johns. Ch. R. 209; *Lewis's exec., v. Bacon's exec's*, 3 Hen. & Munf. R. 89; *Edes v. Goodridge*, 4 Mass. R. 103; *Fay v. Bradley et al.*, 1 Pick. R. 194; *Meredith v. Banks*, 1 Halst. R. 408; *Lightfoot v. Price*, 4 Hen. & Munf. R. 431; *Bunn v. Moore's, exec's*, 1 Hayw. R. 272; *Anon.*, 2 Id. 17; *North et al. v. Mattell*, Id. 151; *Chapline v. Scott*, 4 Har. & McHen. R. 94; *Adm'rs of Norwood ads. Manning*, 2 N. & McC. R. 395; and, where a creditor is entitled to the payment of two distinct sums, one of which is in his own right, and the other to be paid to him as a trustee, and a partial payment is made, it must be appropriated rateably; *Scott v. Ray et als.*, 18 Pick. R. 361; *Barrett v. Lewis*, 2 Id. 123; *Cole v. Trull*, 9 Id. 325; *Harker et al. v. Conrad et al.*, 12 Serg. & Raw. R. 301.

Where an appropriation or application, has been once made, it cannot be altered without the consent of the parties; *Hill et al. v. Sutherland's exec's*, 1 Wash. C. C. R. 128; *White v. Trumbull*, 3 Green's R. 314; *Hilton v. Burley*, 2 N. H. R. 193; *Hopkins v. Conrad et al.*, 2 Raw. R. 316; *Martin v. Draher*, 5 Wat. R. 544; *Bank of North America v. Meredith*, 2 Wash. C. C. R. 47; *Allen v. Calver*, 3 Denio's R. 285; *The Mayor and Commonalty of Alexandria v. Patten et als.*, 4 Cranch's R. 317; *Rundlett v. Small*, 25 Maine R. 29; *Jackson v. Bailey*, 12 Illo. R. 159.

The most embarrassing question in connection with this subject, is, as to when the appropriation is to be made; some of the cases holding, that it may be made at any time; *The Mayor and Commonalty of Alexandria v. Patten et als.*, 4 Cranch's R. 317; *Brady's adm'r v. Hill et als.*, 1 Misso. R. 315; *Hilton v. Barley*, 2 N. H. R. 193; *Starrett v. Barber*, 20 Maine R. 457; *Lindsey v. Stevens*, 5 Dana's R. 104; *Heilbron v. Bissel et al.*, 1 Bail. Eq. R. 430; *Jones v. The United States*, 7 How. R. 681; and others, that the application must be made within a reasonable time; *Harker et al. v. Conrad et al.*, 12 Serg. & Raw. R. 301; *Briggs v. Williams et als.*, 2 Vt. R. 283; *Fairchild v. Holly*, 10 Conn. R. 176; *Patterson v. Hall*, 9 Cow. R. 747; but there is no doubt, that the application cannot be made after a controversy has arisen between the parties; *United States v. Kirkpatrick*, 9 Wheat. R. 720; *Robinson et al. v. Doolittle et al.*, 12 Vt. R. 246; *Fairchild v. Holly*, 10 Conn. R. 176.

inspectorship, by which certain inspectors are appointed to watch the winding up of the debtor's affairs on behalf of the creditors. The payment of the composition is sometimes guaranteed by some friends of the debtor as his sureties, and when payment is made, a release of all demands is given by the creditors. If, however, the composition should not be punctually paid, the creditors will no longer be restrained from proceeding to enforce the full payment of their debts (*n*). Such creditors as hold security for their debts should openly stipulate that their securities are not to be affected; and such a stipulation will be sufficient to preserve them (*o*). But any secret agreement between the debtor and a creditor, by which he is to have any advantage over the others, in order to induce him to agree to the composition, is evidently a fraud on the other creditors, and as such is absolutely void (*p*), and prevents the creditor who is party to it from suing for his share in the composition (*q*).

In some cases an assignment of the debtor's estate and effects is made to trustees for sale and conversion into money, to be divided rateably amongst the creditors. As, however, this is the process [*111] adopted by the law in cases of bankruptcy, where it is carried on under judicial sanction, the law considers that such an assignment of the whole of the estate of a person in trade is an act of bankruptcy, and as such void, if there be any creditor or creditors who have not concurred in it of sufficient amount to sue out a petition for adjudication of bankruptcy (*r*). An exception to this rule is made, if a petition for adjudication of bankruptcy do not issue within three calendar months from the execution of such a deed by any trader, provided the deed be executed by every trustee within fifteen days after the execution thereof by the trader, and that the execution by such trader and by every such trustee be attested by an attorney or

(*n*) *Cranley v. Hillary*, 2 Mau. & Selw. 120.

(*o*) *Nichols v. Norris*, 3 Barn. & Adol. 41; *Ex parte Glendinning*, Buck, 517; *Lee v. Lockhart*, 3 Mylne & Craig, 302; *Cullingworth v. Loyd*, 2 Beav. 385, and the cases collected p. 395; *Bush v. Shipman*, 14 Sim. 289.

(*p*) *Leicester v. Rose*, 4 East, 372; *Knight v. Hunt*, 5 Bing. 482; * *Pendlebury v. Walker*, 4 You. & Coll. 424; *Alsager v. Spalding*, 4 N. C. 407; *Higgins v. Pitt*, 4 Ex. Rep. 312.*

(*q*) *Howden v. Haigh*, 11 Adol. & Ell. 1033.*

(*r*) *Tappenden v. Burgess*, 4 East, 230, *Dutton v. Morrison*, 17 Ves. 193, 199; *Powell v. Lloyd*, 2 You. & Jerv. 372; * *Ex parte Philpott*, Court of Review, 10 Jur. 717. See post, the chapter on Bankruptcy.

solicitor; and provided that notice be given within one month after the execution thereof by such trader, in the London Gazette and two London daily newspapers, if he reside in London or within forty miles of it; or in the London Gazette, one London daily newspaper, and one provincial newspaper published near to such trader's residence, if he do not reside within forty miles of London; and such notice must contain the date and execution of the deed, and the name and place of abode respectively of every such trustee and of such attorney or solicitor (s).

It is also provided by the Bankrupt Law Consolidation Act, 1849 (t), that every deed or memorandum of arrangement entered into between a trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to *ten pounds and upwards, touching such trader's [*112] liabilities and his release therefrom, and the distribution, inspection, conduct, management and mode of winding up his estate, or all or any of such matters or any matters having reference thereto, shall bind all the creditors, and shall not be liable to be disturbed by any prior or subsequent act of bankruptcy. But no creditor who shall not have signed will be bound until after the expiration of three calendar months from the time at which he shall have had notice from the trader of his suspension of payment and of the deed or memorandum of arrangement, unless the trader shall within such time obtain from the Court of Bankruptcy an order or certificate declaring that the deed and memorandum has been duly signed by or on behalf of such a majority of creditors as aforesaid. There appears to be a difference of opinion in the courts whether or not such a deed or memorandum of arrangement must necessarily provide for the entire distribution of the trader's estate amongst his creditors (u).

An act has also been passed for facilitating arrangements between debtors and creditors (x), which applies only to such debtors as are not traders within the bankrupt laws. Under this act any such debtor, with the concurrence of one-third in number and value of his creditors, may, with the sanction of a commissioner of the Court of Bankruptcy,

(s) Stat. 12 & 13 Vict. c. 106, s. 68, repealing stat. 6 Geo. IV. c. 16, s. 4.

(t) Stat. 12 & 13 Vict. c. 106, s. 224.

(u) See Tatley v. Taylor, Q. B. 16 Jur. 59; Drew v. Collins, 6 Ex. Rep. 670.*

(x) Stat. 7 & 8 Vict. c. 70. See Robins v. Hobbs, 9 Hare, 122.

and if his debts have not been improperly incurred, procure two meetings of his creditors to be called, to consider any proposal for the payment or compromise of his debts. And if the major part of the creditors in number and value, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, at the first meeting, [*113] and three-fifths in *number and value, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, at the second meeting, agree to the composition, it will be binding as against all the other creditors who had notice of the meetings, provided it be confirmed by the commissioner, and provided one full third in number and value of all the creditors were present at the second meeting, either in person or by an authorized agent.

[*114]

*CHAPTER IV.

OF BANKRUPTCY.(1)

UNDER some circumstances a debtor is discharged by law from his debt without any actual payment, or without payment of more than a

(1) "Congress passed an act April 4th, 1800, establishing a uniform system of bankruptcy throughout the United States. The act was limited to five years, and from thence to the end of the next session of Congress; but the act was repealed within that period, by the act of December 19th, 1803, and the system was not renewed until 1841.

An effort was made in Congress, in the spring of 1840, to re-establish a uniform system of bankruptcy, and the subject received an able and thorough investigation and discussion, but Congress could not agree on the principles of the system, and the effort failed. The bill which was reported and debated, enabled debtors of every description and class to take advantage of it at their option, and to be thereby completely discharged from their debts

without the co-operation or assent of any creditor. Some of the members of Congress were opposed to any bankrupt system on the part of the United States, as it would enlarge the powers of the federal courts to a great extent, and lead to the creation of a crowd of officers and agents to administer it, and probably to much abuse and corruption. They preferred that the administration of bankrupt and insolvent laws, should remain with the state governments. The compulsory process of bankruptcy at the instance of the creditor, was urged by others as essential to the system, and that the provision should even be extended so as to include corporations, instituted under state authority for banking, manufacturing, commercial, insurance and trading purposes. But this last provision was objected to as most inexpedient, if not abso-

part of it. This occurs in the cases of bankruptcy and insolvency, of each of which some notice appears desirable.

lutely beyond the purview of the constitution. It was apprehended that such a power would lead to infinite abuse, and become expensive and extremely oppressive, and would tend to break up all the monied and business institutions created under state laws, or render the power of control of them most formidable and dangerous. The advocates of the bill contended that bankruptcy was a general term, and meant failure, and was equally applicable to all persons of broken fortunes; that the constitution was not intended to be bound to the English system of bankruptcy, and that Congress had the same power as the British Parliament, to extend the application of it, and that it might and ought to extend it to all classes of debtors who had become disabled and overwhelmed in the peculiar and severe calamity of the times; that though the assent of at least a majority of the creditors to the debtor's discharge, was deemed by the New York board of trade, to be essential to the stability of credit, the rights of creditors, the claims of justice, and the reputation of the country; it was insisted upon, as a compensation for this omission, that the operation of the act would be useful to creditors, though the debtor should be enabled to obtain the benefit of a discharge without their consent or action, for it would put an end to the pernicious practice of giving preference among creditors, and enable the assets of insolvents to be distributed equally among the creditors.

The bill was strongly opposed by other members of Congress on constitutional grounds reaching to the fundamental principles of the bill. It was contended that the power given to Congress to establish uniform laws on the subject of bankruptcy, was one incidental to the regulation of commerce, and applicable only to merchants and traders, or persons essentially engaged, in various ways and modes, in trade and

commerce. That the term bankruptcy was adopted in the constitution, as it stood defined and settled in the English law, where it had a clear and definite meaning; that it was universally taken and understood in that sense, contemporaneously with the adoption of the constitution, and it received that practical construction, and none other, in the bankrupt act of 1800; that the English bankrupt laws discharged the bankrupt from his debts and contracts, and where coercive on the debtor, and put in action at the instance of creditors, and at their instance only; that the proceeding was for the equal benefit of all the creditors, and its justice and policy, as applicable to that class of debtors, was founded on the peculiarly hazardous business of trade and commerce, and the necessity of large credits to sustain an extensive foreign and domestic trade; that there was a marked difference between bankrupt and insolvent laws, in the jurisprudence of England and of America, and which had been recognized by the Supreme Court of the United States; that insolvent laws were left to the cognizance of the individual states, each of which had its own system of insolvent laws, and which the bill before the House would entirely supersede, for it was in fact a general and sweeping insolvent law, and it was apprehended that its operation on credit, and the popular sense of the legal and moral obligation of contracts, would be disastrous.

The effort to establish a national bankrupt law was renewed at the next session of Congress, and was successful. An act of Congress, "To establish a uniform system of bankruptcy throughout the United States," was passed the 19th of August, 1841. It was declared to apply to all persons whatsoever, residing within the United States, who owed debts, not created in consequence of a defalcation as a public officer, or as executor, administrator, guard-

And first as to bankruptcy. The whole of the law of bankruptcy is now governed by the recent act to amend and consolidate the laws relating to bankrupts (a) which came into operation on the 11th of

(a) Stat. 12 & 13 Vict. c. 106.

ian or trustee, or while acting in any other fiduciary character, and who should by petition on oath, setting forth a list of their creditors, and an inventory of their property, apply to the District Court for the benefit of the act, and declare themselves unable to meet their debts and engagements. The act was further declared to apply to all persons being merchants, or using the trade of merchandize, and all retailers of merchandize, and all bankers, factors, brokers, underwriters or marine insurers, owing debts to the amount of two thousand dollars, who should be liable to become bankrupts, upon petition of one or more of their creditors to the amount of five hundred dollars, provided they had absconded, or fraudulently procured themselves or their property to be attached or taken in execution, or had fraudulently removed, or concealed, or assigned, or sold their property. The bankrupt when duly discharged, was declared to be free from all his debts. The first provision is a sweeping insolvent law, and applies to all debtors, and upon their own voluntary application; the second is confined to merchants and traders, and the act is put in operation only at the instance of the creditors. The numerous details of the statute, and the many questions which were raised, discussed, and decided, in the District and Circuit Courts of the United States, in the execution of the act, cannot be noticed in the limited space allowed in this note, nor would they be any longer interesting, since the entire statute was repealed by Congress on the 3d of March, 1843. The provision in the bankrupt act which rendered it a general insolvent act, and was the one almost exclusively in operation, gave occasion to serious doubts, whether it was within the true construction and purview of the constitution, and it was that branch of the

statute that brought the system, and I think justly, into general discredit and condemnation, and led to the repeal of the law. In the cases of *Kunzler v. Kohans*, and of *Sackett v. Andross*, 5 Hill's N. Y. Rep. 317, 327, the constitutionality and construction of the bankrupt act of Congress of 1841, was largely discussed, and it was held that the *voluntary* as well as the other branch of the act, was constitutional, and applied as well to debts created *before* as *after* its passage. Mr. Justice BRONSON, in a very elaborate opinion, dissented from both of these propositions. And Judge WELLS, of the United States District Court of Missouri, in the case of *Edward Kleen*, 2 N. Y. Legal Observer, 184, after a very full consideration of the subject, also decided that the provision in the act of Congress of 1841, for the discharge of a *voluntary* debtor from his debts and future acquisitions, without payment or assent of his creditors, was unconstitutional."

The foregoing note, taken from Kent's Commentaries, &c., Vol. 2, p. 390, n. c., gives a general view of the provisions continued in the repealed bankrupt law, and its scope; the practical bearing of this law is probably no longer interesting, but for a full consideration thereof, see "Owen on Bankruptcy;" "The Bankrupt Law of the United States, with a Commentary containing a full explanation of the law of Bankruptcy," published in 1841, in Philadelphia; a Note at the end of Vol. 2, Part II. of "Starkie on Evidence;" and two tracts published in New York, in the year 1842, one by J. B. Staples, and entitled, "The General Bankrupt Law," &c., and the other by Geo. A. Bicknell, Jr., and entitled, "A Commentary on the Bankrupt Law of 1841, showing its operation and effect."

October, 1849, and by which all the previous acts have been repealed. Of these the most important was the statute of 6 Geo. 4, c. 16, "an act to amend the laws relating to bankrupts," which had been amended and altered by various others (*b*), the provisions of which, with some alterations, have been consolidated in the present act. And first as to the persons liable to become bankrupt. No person can be a bankrupt who is not a trader within the meaning of the laws relating to bankrupts. The persons who are such traders are all alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, curriers, cattle or sheep salesmen, coach proprietors, cow keepers, dyers, fullers, keepers of inns, taverns, hotels or coffee houses, lime* burners, livery stable keepers, market [*115] gardeners, millers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, wharfingers, scriveners receiving other men's monies or estates into their trust or custody, persons insuring against perils of the sea, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise in gross or by retail, and all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities. But no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, shall be deemed as such a trader liable to become bankrupt (*c*). An attorney or solicitor, as such, is not within the bankrupt law; but if he is in the habit of receiving his clients' money into his own hands and investing it for them, and charging a compensation for so doing, in addition to his charges for other professional business, he will be liable to become bankrupt as a scrivener receiving other men's monies into his trust (*d*). An alien or denizen is within the bankrupt law (*e*); and so is a married woman carrying on trade for her separate use by the custom of London (*f*),

(*b*) 1 & 2 Will. IV. c. 56; 3 & 4 Will. IV. c. 47; 1 & 2 Vict. c. 110; 2 Vict. c. 11; 2 & 3 Vict. c. 29; 5 & 6 Vict. c. 122; 7 & 8 Vict. c. 96; 8 & 9 Vict. c. 48; 10 & 11 Vict. c. 102; 11 & 12 Vict. c. 86.

(*c*) Stat. 12 & 13 Vict. c. 106, s. 66.

(*d*) *Malkin v. Adams*, 2 Rose, 28; *Ex parte Bath*, Mont. 82, 84, where the cases are collected. See also *Wilkinson v. Candlish*, 5 Exch. Rep. 91, 97.*

(*e*) Stat. 12 & 13 Vict. c. 106, s. 277.

(*f*) *Ex parte Carrington*, 1 Atk. 206.

or whilst her husband is undergoing sentence of transportation (*g*). But an infant under the age of twenty-one years cannot be a bankrupt, because by the law of England he cannot *be made liable [*116] on contracts entered into by him in the course of trade (*h*).

A person within the bankruptcy laws becomes bankrupt by committing an *act of bankruptcy*. The following acts, if done with intent to defeat or delay the creditors of a trader, are acts of bankruptcy, namely, if any such trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested or taken in execution for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested or taken in execution, or his goods, monies, or chattels, to be attached, sequestered or taken in execution, or make or cause to be made either within this realm or elsewhere any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels (*i*). It is also an act of bankruptcy for a trader to lie in prison for debt for twenty-one days, or having been committed or detained for debt, to escape out of prison or custody. (*j*).

Most of the above acts of bankruptcy have been such ever since a bankrupt was first defined by the statute of Elizabeth "touching orders for bankrupts (*k*)."
Bankruptcy was then considered as a crime, and the bankrupt was called "an offender (*l*)."
But in modern times bankruptcy has been looked upon as the proper *remedy for a [*117] trader in embarrassed circumstances. He gives up all his property to his creditors, to be divided rateably amongst them; and, if his behaviour has been free from serious blame, he obtains a discharge from past liabilities, together with a small allowance to enable him to begin the world again (*m*). An act of bankruptcy may

(*g*) Ex parte Franks, 7 Bing. 762; * 1 M. & Scott, 1.*

(*h*) Belton v. Hodges, 9 Bing. 365, 370.*

(*i*) Stat. 12 & 13 Vict. c. 106, s. 67.

(*j*) Sect. 69.

(*k*) Stat. 13 Eliz. c. 7.

(*l*) Ibid. s. 10; 2 Black. Com. 471.

(*m*) Stat. 12 & 13 Vict. c. 106, s. 195.

accordingly now be committed by merely filing with the chief registrar of the Court of Bankruptcy (*n*) a formal declaration, signed by the trader, and attested by an attorney or solicitor, that he is unable to meet his engagements, provided a petition for adjudication of bankruptcy be filed within two calendar months (*o*). And a petition for adjudication of bankruptcy, under which the trader is now declared bankrupt (*p*), may be filed by any trader against himself; but it is now provided, that unless such trader shall forthwith, after the filing of his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges (to be estimated by the court) of prosecuting the bankruptcy, such petition shall be dismissed; and no further petition shall be filed by such trader in the same district without the leave of the court, and the adjudication on any further petition shall be subject to the like condition as to the available estate of the trader (*q*). So an act of bankruptcy may now be lawfully concerted or agreed upon between the bankrupt and any creditor or other person (*r*), which was not the case at the time when bankruptcy was considered an offence (*s*). Again, if a creditor recover judgment *against a trader in any [*118] personal action for the recovery of any debt or money demand in any court of record, and be in a situation to sue out execution upon such judgment, and there be nothing due from him by way of set-off, he may serve notice in writing upon such trader personally, requiring immediate payment of such judgment debt; and if the trader do not pay or satisfy him within seven days after such service, he commits an act of bankruptcy on the eighth day after service of such notice (*t*). So if any trader shall disobey any order or decree made in any cause in Chancery, or in any matter of bankruptcy or lunacy, and duly served on him, for payment of any sum of money, the court may, by order, fix a peremptory day for payment; and if such trader, being personally served with such last-mentioned order seven days before the day therein appointed for payment of such money, shall neglect to pay the same, he commits an act of bankruptcy on the eighth day

(*n*) Stat. 15 & 16 Vict. c. 77, s. 2.

(*o*) Stat. 12 & 13 Vict. c. 106, s. 70. See *Ex parte Hunt*, 3 De Gex & Smale, 572.

(*p*) Stat. 12 & 13 Vict. c. 106, s. 89.

(*q*) Sect. 93.

(*r*) Sect. 115.

(*s*) *Ex parte Gouthwaite*, 1 Rose, 87; *Ex parte Brookes*, Buck, 257.

(*t*) Stat. 12 & 13 Vict. c. 106, s. 72.

after the service of such order (*u*). It is also an act of bankruptcy for a trader in prison to file a petition for his discharge under the laws for relief of insolvent debtors, provided he be declared bankrupt before the time advertised for him to be brought up to be dealt with according to such laws, or within two calendar months from the time of the order vesting his estate in the provisional assignee of the court for relief of insolvent debtors: and in such case his estate is divested out of such assignee (*x*). It is also now provided, that on a proper affidavit of debt being made by any creditor, stating, amongst other things, the delivery to the trader personally, or to some adult inmate at his usual or last known place of abode or business, of written particulars of his demand, with notice requiring immediate payment, such trader may be summoned to appear before the bankrupt court [*119] either to *admit the demand, or to swear that he verily believes that he has a good defence to such demand or to some part of it. And in such case the court is now empowered to require the trader to enter into a bond with two sureties to pay such sum as shall be recovered, together with such costs as shall be given, in any action, which shall have been or shall be brought for the recovery of such demand or any part thereof (*y*). And if he admits the demand, and does not satisfy the creditor within seven days next after the filing of such admission, he commits an act of bankruptcy on the eighth day after the filing of such admission, provided a petition for adjudication of bankruptcy be filed against him within two calendar months from the filing of the creditor's affidavit (*z*). After such a summons, an admission of debt may be made with the same effect, without the trader's appearing in court, provided it be made in the prescribed form, and there be present some attorney of one of her majesty's superior courts of law on behalf of such trader, expressly named by him and attending at his request, to inform him of the effect of such admission before the same is signed by him, and provided also that such attorney do subscribe his name thereto as a witness to the due execution thereof, and in such attestation declare himself to be attorney for the said trader, and state therein that he subscribes as such attorney (*a*). If the trader do not appear when summoned, or if

(*u*) Sect. 73.

(*x*) Stat. 12 & 13 Vict. c. 106, s. 74.

(*y*) Stat. 12 & 13 Vict. c. 106, ss. 78, 79.

(*z*) Sect. 81.

(*a*) Sect. 84.

on appearing he refuse to sign the admission of debt (*b*), or admit only part, without swearing to his belief that he has a good defence to the debt or to the part not admitted, and if required by the court enter into such a bond as is mentioned above, then he commits an act of bankruptcy on the eighth day after service of the *summons, [*120] unless within seven days from such service, or within such enlarged time as may be granted to him, he satisfies the creditor, or enters into a bond with two sureties, to be approved by the court, to pay such sum and costs as shall be recovered in any action for the debt; but the petition for adjudication of bankruptcy must be filed within two calendar months from the filing of the creditor's affidavit (*c*). No person is now liable to become bankrupt by reason of any act of bankruptcy committed more than twelve calendar months prior to the filing of any petition for adjudication of bankruptcy against him (*d*).

When an act of bankruptcy has been committed by a trader, any creditor or creditors may petition the court of bankruptcy for an adjudication of bankruptcy against him, provided the amount of their debts be as follows:—the single debt of any creditor, or of two or more being partners, 50*l.* or upwards; the debt of two creditors, 70*l.* or upwards; and the debt of three or more creditors, 100*l.* or upward: and every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may petition or join in petitioning, whether he shall have had any security in writing for such sum or not (*e*). The debt, however, must be a legal debt, and one for which the creditor might sue at law in his own name (*f*). The truth of the petition is sworn to by the petitioning creditor, and immediately after it is filed, the Court of Bankruptcy has now, without any further authority, full power over the bankrupt and his real and personal estate for payment of his creditors according to the *act (*g*). An entry of the petition [*121] is made in a book called the Docket Book (*h*). This is called *striking a docket*. If the trader shall, after the filing of a petition for

(*b*) Sect. 83.

(*c*) Stat. 12 & 13 Vict. c. 106, ss. 80, 82.

(*d*) Sect. 88.

(*e*) Sect. 91.

(*f*) *Medlicot's case*, 2 Str. 899; *Ex parte Sutton*, 11 Ves. 103.

(*g*) Stat. 12 & 13 Vict. c. 106, s. 89.

(*h*) Sect. 94.

adjudication of bankruptcy against him, pay to the petitioning creditor any money, or give him any satisfaction or security for his debt, or any part thereof, whereby he may receive more in the pound in respect of his debt than the other creditors, such trader thereby commits an act of bankruptcy; and if adjudication of bankruptcy shall have been made under such petition, the court may either declare such adjudication to be valid, and direct the same to be proceeded in, or may order it to be annulled, and a new petition for adjudication may be filed, which may be supported by proof either of such last-mentioned or any other act of bankruptcy (*i*).

Formerly a commission of bankruptcy under the great seal issued in every case, whereby certain persons were appointed commissioners for the purpose of directing that particular bankruptcy (*k*). Subsequently a Court of Bankruptcy was erected in London, and certain fixed commissioners appointed, by any one of whom the duties of a commissioner were to be performed in all cases of bankruptcies in London (*l*). When the docket had been struck, the creditor presented a formal petition to the Lord Chancellor, whereupon a fiat in bankruptcy issued, whereby the creditor was authorized to prosecute his complaint against the trader in the Court of Bankruptcy, or before one of the commissioners of that court (*m*). And more recently fixed commissioners have been appointed throughout the country, each of whom has a separate district, and forms a court of record (*n*).

[*122] *The fiat however is now abolished; and the debt, the trading, and the act of bankruptcy having been proved, the trader is adjudged a bankrupt by the court to which the petition is presented (*o*); and a duplicate of the adjudication is then served on the bankrupt, who is allowed seven days, or such extended time not exceeding fourteen days in the whole as the court shall think fit, from such service to show cause against the validity of the adjudication; and if, at the expiration of that time, he can show no such cause, notice of the adjudication is forthwith advertised in the London Gazette; and two public sittings of the court are appointed for the

(*i*) Sect. 71.

(*k*) Stat. 13 Eliz. c. 7, s. 2; 6 Geo. IV. c. 16, s. 12.

(*l*) Stat. 1 & 2 Will. IV. c. 56.

(*m*) Ibid. s. 12.

(*n*) Stats. 5 & 6 Vict. c. 122, s. 59 *et seq.*; 12 & 13 Vict. c. 106, ss. 6—11.

(*o*) Stat. 12 & 13 Vict. c. 106, s. 101.

bankrupt to surrender and conform, the last of which must be on a day not less than thirty and not exceeding sixty days from such advertisement, and must be the day limited for such surrender. But notice of the adjudication may be advertised immediately, with the consent of the bankrupt testified in writing under his hand before the court (*p*).

The bankrupt is free from arrest and imprisonment by any creditor in coming to surrender, and after such surrender during the time limited for such surrender, and such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed (as after mentioned,) as the court shall, from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint, provided he was not in custody at the time of such surrender (*q*).

If the bankrupt do not commence proceedings to dispute the petition for adjudication, and prosecute the same with diligence and effect within twenty-one days after the advertisement (if he were within the united *kingdom at the date of the adjudication,) or within [*123] three calendar months (if in any other part of Europe,) or within a twelvemonth (if elsewhere); the Gazette containing the advertisement is conclusive evidence in all cases as against such bankrupt, and in all actions by his assignees for his debts, that he became a bankrupt previously to the date and filing of the petition for adjudication, and that the petition was filed on the day stated in the Gazette (*r*).

Along with the advertisement of the bankruptcy appears that of the appointment of an official assignee of the bankrupt's estate. The official assignees are officers of the Bankruptcy Court, one of whom is appointed by the court to act for every bankruptcy. His duty is to receive all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of the estate and effects, real and personal, of the bankrupt; and, until other assignees are chosen by the creditors, he is the sole assignee of the bankrupt's estate and effects (*s*), all of which, copyholds only excepted (*t*), vest in such assignee by virtue of his appointment (*u*).

(*p*) Sect. 104.

(*q*) Sect. 112.

(*r*) Stat. 12 & 13 Vict. c. 106, s. 233.

(*s*) Sect. 40.

(*t*) See Principles of the Law of Real Property, 298, 3d ed.

(*u*) Stat. 12 & 13 Vict. c. 106, s. 142.

At the public sittings of the court the creditors of the bankrupt prove their debts. As the bankrupt is discharged from such claims only as have been or might have been proved under the bankruptcy, provision has been made for the proof of as many demands as possible. Thus a security, payable at a future time, may be proved with a rebate of interest at the rate of five per cent., to be computed from the declaration of a dividend to the time at which the debt secured [*124] would have *become payable according to the terms upon which it was contracted (*x*). Provision is also made for the set-off of mutual credits or debts between the bankrupt and any creditor, so that the balance only shall be claimed or paid on either side (*y*); also for the proof of any debt by any surety for the bankrupt who may have paid it, although after the filing of the petition for adjudication of bankruptcy, but not so as as to disturb former dividends (*z*). Persons insured may also prove after the happening of the loss, and may receive dividends with the other creditors, as if the loss had happened before the filing of the petition (*a*). Annuity creditors may also prove for the value of their annuities, to be ascertained by the court, regard being had to the original price (*b*); and if there should be any collateral surety for the annuity, he will be discharged from all claims in respect of the annuity on payment of the amount so proved (*c*). Debts payable upon contingencies which shall not have happened before the issuing of the fiat, may be valued by the court on the application of the creditor, and the amount so ascertained may be proved as the debt (*d*). It is also now provided that if the bankrupt shall have contracted, before the filing of the petition, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, then, if the liability be not otherwise proveable, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to [*125] prove such demand, and receive dividends *with the other creditors, and so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of

(*x*) Sect. 172.

(*z*) Sect. 173.

(*b*) Sect. 175.

(*d*) Sect. 177.

(*y*) Sect. 171.

(*a*) Sect. 174.

(*c*) Sect. 176.

such petition, but not disturbing former dividends; provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed; provided also that where any such claim shall not have, either in whole or in part, been converted into a proof within six calendar months after the filing of the petition, it may, upon the application of the assignees at any time afterwards, and if the court shall think fit, be expunged either in whole or in part from the proceedings (*e*). Interest on overdue bills and notes may also be proved (*f*); also the costs, though untaxed, of obtaining any judgment, decree or order which may have been made for any debt or demand, in respect of which the plaintiff or petitioner shall prove under the bankruptcy (*g*). But the court has power to expunge the proof of any debt either wholly or in part, if, upon proper evidence, it shall be of opinion that it is not due (*h*). If any creditor should hold security upon any part of the property of the bankrupt by way of mortgage or lien, such creditor will not be allowed to prove for the full amount of his debt without giving up his security for the benefit of the other creditors (*i*). But if he be the sole incumbrancer on the property (*j*), he may obtain an order for its sale; and in case the money arising from the sale should be insufficient to pay him his due, he will be admitted a creditor under the bankruptcy for the deficiency, and receive dividends rateably with the rest of the creditors, but so as not to disturb any dividends already made (*k*).

*At the first public sitting appointed by the court, assignees of the bankrupt's estate are chosen, in addition to the official assignee, by the major part in value of the creditors who have proved debts to the amount of 10*l*. and upwards, subject to the power of the court to reject any person chosen who shall appear to such court to be unfit (*l*). The creditors' assignees, as they are called, have the sole right of appointing and removing the solicitor to the bankruptcy, and of directing the time and manner of effecting the sale of the bankrupt's estate and effects (*m*). On their appointment all the estate and effects of the bankrupt vested in the official assignee vest in them jointly

(*e*) Sect. 178.

(*f*) Sect. 180.

(*g*) Sect. 181.

(*h*) Sect. 183.

(*i*) *Ex parte Downes*, 18 Ves. 290.

(*j*) *Ex parte Jackson*, 5 Ves, 357; *Ex parte Topham*, 1 Madd. 38.

(*k*) Lord Loughborough's Order of 8th March, 1794.

(*l*) Stat. 12 & 13 Vict. c. 106, s. 139.

(*m*) Sect. 40.

with him without any conveyance or assignment; and as often as any assignee dies or is lawfully removed, and a new assignee is duly appointed, all such real and personal estate as was then vested in the deceased or removed assignee, vests by virtue of such appointment in the new assignee, either alone or jointly with the existing assignees, as the case may require (*n*). The bankrupt, however, is not bound to deliver up the necessary wearing apparel of himself, his wife and children (*o*). Formerly a deed of bargain and sale was executed by the major part of the commissioners acting in the bankruptcy to the assignees, whereby all the real and personal estate of the bankrupt, except copyholds, was conveyed and assigned to the assignees (*p*). But at length, in the year 1831, when the Court of Bankruptcy was established in London, it was discovered that the mere appointment of the assignees might operate as effectually as a deed of conveyance to vest the bankrupt's estate in them.

[*127] As the bankruptcy of a person consists in his *committing an act of bankruptcy, and not in his being adjudged bankrupt, his assignees, when appointed, become entitled to all the real and personal estate of which he was possessed at the hour when he committed the act (*q*), though the legal estate in the bankrupt's lands remains vested in him until conveyed to the assignees by their appointment (*r*). The title of the assignees, it is said, relates back to the act of bankruptcy. The consequences of this rule were formerly very serious, as many *bonâ fide* transactions were overturned in consequence of an act of bankruptcy having been committed by one of the parties without the knowledge of the other. But after several partial remedies (*s*), it is now enacted that all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before the filing of a petition for adjudication of bankruptcy, and all payments really and *bonâ fide* made to any bankrupt before the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the filing of such petition, and all contracts, dealings

(*n*) Sects. 141, 142.

(*o*) Sect. 251.

(*p*) Stat. 6 Geo. IV. c. 16, ss. 63, 64.

(*q*) *Thomas v. Desanges*, 2 Bar. & Ald. 586; *Rouch v. Great Western Railway Company*, 1 Q. B. 51.*

(*r*) *Doe d. Esdaile v. Mitchell*, 2 Mau. & Selw. 446.

(*s*) Stat. 46 Geo. III. c. 135, s. 1; 49 Geo. III. c. 121, s. 2; 56 Geo. III. c. 137, s. 1; 6 Geo. IV. c. 16, ss. 81, 82, 84; 2 & 3 Vict. c. 11, s. 12; 2 & 3 Vict. c. 29.

and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bonâ fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure *and sale* before the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit *or on whose account such execution or attachment shall have issued, had not at the time of such pay- [*128] ment, conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed (*t*). The effect of this enactment is to substitute the filing of the petition for adjudication for the *act* of bankruptcy, so far as respects all persons dealing and acting *bonâ fide* and without notice of the act of bankruptcy. But it is provided that this enactment shall not give validity to any payment, or to any delivery or transfer of any goods or chattels made by any bankrupt being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor, or to any execution founded on a judgment on a warrant of attorney, or *cognovit actionem*, or judge's order obtained by consent given by any bankrupt by way of fraudulent preference (*u*). A purchase, however, from any bankrupt, *bonâ fide* and for valuable consideration, even if made with notice of an act of bankruptcy, shall not be impeached by reason thereof, unless a petition for adjudication shall have been filed within twelve calendar months after such act of bankruptcy (*v*).

The estate and effects of the bankrupt being thus vested in his assignees, are sold, got in and converted into money by them, and a dividend is made whenever the court thinks fit, out of the proceeds, amongst the creditors rateably (*x*). In order to obtain a full discovery of the bankrupt's estate, the commissioner has power to examine him, and also his wife, under penalty of imprisonment if the answers be not

(*t*) Stat. 12 & 13 Vict. c. 106, s. 133.

(*v*) Sect. 134.

(*u*) Sect. 133.

(*x*) Sect. 137.

[*129] satisfactory (*y*). *But the oath formerly administered to them is now dispensed with (*z*). In the payment of dividends no preference is given on account of the nature of the debt, whether judgment debt, bond debt, specialty or simple contract. In this respect the Court of Chancery, to which the jurisdiction in bankruptcy anciently belonged, and which now exercises an appellate jurisdiction (*a*), followed its rule that equality is equity. And if any trader, in contemplation of bankruptcy (*b*), should voluntarily, and without pressure (*c*), pay or secure any one of his creditors, with a view of giving him a preference over the others, such payment or security will be void as against the assignees (*d*). The crown, however, may enforce payment of the entire debt of a bankrupt crown debtor, notwithstanding the bankrupt laws (*e*). And a judgment debt, if entered up one year at least before the bankruptcy, is, by the statute for extending the remedies of creditors, a charge in equity on all the bankrupt's real estate (*f*). The landlord of a bankrupt may also, notwithstanding an act of bankruptcy, distrain for his rent, not exceeding one year's rent accrued prior to the day of the filing of the petition for adjudication (*g*). The wages or salary of a clerk or servant of the bankrupt, for any time not exceeding three calendar months, and not exceeding 30*l.* (*h*), and also the wages of any labourer or workman, not exceeding 40*s.*, may be ordered by the court to be paid in full (*i*). In case the proceeds of the bankrupt's estate should be more than sufficient to pay 20*s.* in the [*130] pound, interest at four *per cent.*, or at such *other rate as may have been reserved or may be payable by law, is given to the creditors from the date of the petition; and the surplus, after this, is paid over to the bankrupt (*k*), who however in all events is entitled to an allowance out of the property varying with the amount of the dividend produced (*l*). And if the bankrupt or his friends shall, after he has passed his last examination, make an offer of composition, which nine-tenths in number and value of the creditors assembled at two

(*y*) Sects. 117, 118, 260.

(*z*) Stat. 12 & 13 Vict. c. 106, s. 246.

(*a*) Sect. 12.

(*b*) *Wheelwright v. Jackson*, 5 Taunt. 109.*

(*c*) *Crosby v. Crouch*, 11 East, 256.

(*d*) *Rust v. Cooper*, Cowp. 629.

(*e*) *Anon.* 1 Atk. 262.

(*f*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*g*) Stat. 12 & 13 Vict. c. 106, s. 129.

(*h*) Sect. 168.

(*i*) Sect. 169.

(*k*) Sect. 197.

(*l*) Sect. 195.

successive meetings shall agree to accept, the court may, upon such acceptance being testified by them in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy, and dismiss the petition for adjudication (*m*).

If the bankrupt has duly surrendered and conformed to the bankrupt law, and has not lost certain specified amounts by gaming or speculating in the funds, and has not parted with, concealed, destroyed, altered, mutilated or falsified books or papers, or made any false or fraudulent entries with intent to defraud his creditors, or concealed any part of his property, or permitted any false debt to be proved, or have afterwards known the same without disclosing the same to his assignees within one calendar month after such knowledge (*n*), he will be entitled to a certificate of conformity, by which he will be discharged from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy (*o*). Formerly the certificate was required to be signed by a given proportion of the creditors (*p*); but now, the court is the sole judge of any objections which may be made by any creditors against allowing the certificate; and the court may either allow *the same or refuse or suspend [*131] the allowance thereof, or annex such conditions thereto as the justice of the case may require (*q*). The certificates are now divided into three classes. If the bankruptcy has arisen from unavoidable losses and misfortunes, the bankrupt is entitled to a certificate of the first class. If the bankruptcy has not *wholly* arisen from unavoidable losses and misfortunes, he is entitled to a certificate of the second class. And if the bankruptcy has not arisen from unavoidable losses or misfortunes, he is only entitled to a certificate of the third class (*r*). Contracts or securities to induce any creditor to forbear opposition to the allowance of the certificate are void (*s*); and the creditor forfeits the treble value or amount of any money, goods or security so obtained (*t*).

Until the bankrupt obtains his certificate, all the real and personal

(*m*) Sec. 230.

(*n*) Sect. 201.

(*o*) Sects. 199, 200.

(*p*) Stat. 6 Geo. IV. c. 16, s. 122.

(*q*) Stat. 12 & 13 Vict. c. 106, s. 198.

(*r*) Ibid. Schedule Z.

(*s*) Sect. 202. Bona fide holders without notice may be prejudiced by this provision, which should have been copied from stat. 6 Geo. IV. c. 16, s. 125, as amended by stat. 5 & 6 Will. IV, c. 41.

(*t*) Stat. 12 & 13 Vict. c. 106, s. 270.

property which may descend, revert, or be devised or bequeathed or come to him, becomes vested in his assignees (*u*). But an uncertificated bankrupt may maintain an action for his personal labour performed after the bankruptcy (*x*), and he may also sue in respect of contracts made with himself, and also in respect of any after-acquired property, if the assignees or creditors do not interfere (*y*). But it is now provided that the assignees, as to the total amount of the debts due, and every creditor to the extent of his debt proved, shall be deemed [*132] judgment creditors of the bankrupt; *and the court when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a sealed certificate in a prescribed form, which shall have the effect of a judgment in one of the superior courts at Westminster until the allowance of the certificate; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt (*z*).

All the proceedings in bankruptcy are entered of record in the Court of Bankruptcy (*a*); and every proceeding or order in bankruptcy appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, is at all times and on behalf of all persons, to be admitted into all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof (*b*).

Provision has also been made by the recent bankrupt act for arrangements between traders and their creditors under the control of the Court of Bankruptcy, by which a trader may obtain protection from arrest; and the arrangement, if assented to by three-fifths in number and value of the creditors who shall have proved debts to the amount of ten pounds, at two consecutive meetings, and confirmed by the court, will be binding on all the creditors (*c*).

(*u*) Sects. 141, 142.

(*x*) *Silk v. Osborn*, 1 Esp. R. 140.

(*y*) *Webb v. Fox*, 7 T. Rep. 391; *Drayton v. Dale*, 2 Barn. & Cress. 293; * *Crofton v. Poole*, 1 Barn. & Adol. 568.*

(*z*) Stat. 12 & 13 Vict. c. 106, s. 257.

(*a*) Sect. 6.

(*b*) Sect. 236.

(*c*) Sects. 211-223.

*CHAPTER V.

[*133]

OF INSOLVENCY. (1)

INSOLVENCY, strictly speaking, means a general inability to meet pecuniary engagements (*a*). But the term is very commonly and conveniently applied to the means of getting rid of such engagements afforded by certain acts of parliament which have passed for the relief of insolvent debtors; and in this latter sense the term is here intended to be used.

(*a*) *Biddlecombe v. Bond*, 4 Adol. & Ell. 332.*

(1) The laws and regulations on the subject of insolvency are almost as divers as there are states in the Union. To give a sketch of all these laws, and the judicial constructions of them, would far exceed the limits of a note. The decisions, as to what is a valid preference made by a debtor in favor of a creditor, and what an invalid one—as to what is a good assignment for the benefit of creditors, and what bad—together with the many other questions of a like nature relating to the peculiar system and practice of each state, are doubtless of interest to the citizens of the respective states; but it can scarcely be expected, and it certainly would not be advantageous, to collect together these diversities, numerous as they are, and depending as they do, almost entirely upon an interpretation of the statutes of the several state legislatures, for such a collection could result in nothing but confusion. The insolvent law of each state is regulated by the acts of the legislature and judicial opinions of that state, and will be conclusive upon all its citizens, unless there be a conflict between the laws of a state and those of the general government; *Griswold v. Platt*, 9 Metef. R. 16; *Betts v. Bagley*, 12 Pick. R. 580; *Alexander v. Gibson*, 1 N. & McC. R. 483; *Clark, assignee, &c. v. Rosenda et al.*, 5 Robins. R.

27. It is only, therefore, those questions which are of general interest, that will be here considered.

By the term “insolvent law,” as generally received, is understood a law operating upon the remedy of a contract, and not upon the contract itself; discharging indeed the debtor from imprisonment, but not releasing his future acquisitions of property from the payment of his debt; while under the words “bankrupt-law,” is comprehended all those enactments which discharge the debtor from liability upon his contract. That this distinction between bankrupt and insolvent laws, though ordinarily received as true, cannot be entirely relied on, may be seen from the opinion of Chief Justice Marshall, in the case of *Sturges v. Crowninshield*, 4 Wheat. R. 194: “It is said * * * that laws which merely liberate the person are insolvent laws, and those which discharge the contract, are bankrupt laws. But if an act of Congress should discharge the person of a bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act, and therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at

The principal act for the relief of insolvent debtors in England is the statute 1 & 2 Vict. c. 110, the former sections of which are, however, occupied in abolishing arrest on mesne process in civil

the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity." Notwithstanding this decision, the District Judge of Missouri, in *Nelson v. Carland*, pronounced the Act of Congress of 1841, authorizing a debtor to be declared a bankrupt upon his own petition, a mere insolvent law; but upon a certificate of difference of opinion between the judges of the Circuit and District Courts, the Supreme Court declared, that, under the circumstances of that case, the act did not give a power of review, and that the decision of the district judge must be regarded as final; 1 How. R. 269. This difficulty of distinguishing between bankrupt and insolvent laws, has perhaps, in part caused that diversity of opinion which has led to the holding in some cases, that the states not only have power to pass insolvent laws, but also bankrupt laws; *Ogden v. Saunders*, 12 Wheat. R. 213; *Woodhull et al. v. Wagner*, 1 Baldw. R. 296; *Shaw v. Robins*, 12 Wheat. R. 369; *Mason v. Haile*, Id. 370; *Beers et al. v. Haughton*, 9 Pet. R. 330; *Hempstead v. Reed*, 6 Conn. R. 480; *Norton v. Cook*, 9 Id. 314; *Blair, &c. v. Williams*, 4 Litt. R. 35; *Bronson v. Newberry*, 2 Doug. R. 38; *Brown v. Dillahunty et al.*, 4 Smed. & Mar. R. 725; *Gray et al. v. Monroe et al.*, 1 McLean's R. 528; *Roosevelt v. Cebra*, 17 Johns. R. 108; *Post v. Riley*, 18 Id. 54; *Penniman v. Meigs*, 9 Id. 325; *Ex parte Ziegenfuss*, 2 Ired. L. R. 467; *Smith v. Parsons*, 1 O. R. 236; *Alexander v. Gibson*, 1 Nott. & McC. R. 483; while, on the contrary, other authorities maintain that the state legislatures have no power to pass bankrupt laws; *McMillan v. McNeill*, 4 Wheat. R. 209; *Golden v. Price*, 3 Wash. C. R. 313; *Farmers' and Mechanics' Bank of Penna. v. Smith*, 6 Wheat. R. 131; *Glenn v. Humphreys*, 4 Wash. C. C. R. 424; *Medbury v. Hopkins*, 3 Conn. R. 472; *Balentine et als. v. Haight*, 1 Harring. R. 197; *Olden et al. exec's v. Hallet*, 2 South. R. 466. All the cases, however, agree that the state governments have no power to make a law impairing the obligation of a contract, and the only question of dispute between them has been whether a state bankrupt law impairs the obligation of a contract, some holding that it does, because we understand by a bankrupt law, one which absolutely discharges the debt, and others, admitting the definition of a bankrupt law, deny that it impairs the contract, if the bankrupt law was in existence at the time when the contract was made, because the contract was then made in subserviency to existing laws. As to insolvent laws, it has been determined that inasmuch as they, according to the ordinary acceptation of the term, operate merely upon the remedy, and not upon the contract itself, they cannot be said to impair the obligation of contracts, and are consequently valid. The effect of a discharge under the insolvent law of a state may be regarded as at rest, so far as regards the decisions of the courts of the United States; *Boyle v. Zacharie et al.*, 6 Pet. R. 635. That other question also, in respect to the clashing of the authority of the state and general government, may be considered determined, for in the words of Chief Justice Marshall, in the case of *Sturges v. Crowninshield*, above referred to—"This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion, that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bank-

actions, and in extending the remedies of judgment creditors against the property of their debtors. So far as the act relates to insolvent debtors, it is, for the most part, a reprint, with some important

rupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the constitution, which would deny to the state legislature the power of acting on this subject, in consequence of the grant to Congress. It may be thought more convenient, that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the law of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject may cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."

It being settled, then, that the states have power to make insolvent laws, another very interesting question arises, as to the extent of the jurisdiction of those laws; and this has occasioned considerable diversity of sentiment; although, for general purposes, the people of this country are one, yet, in all other respects the states are necessarily foreign and independent of each other; Buckner v. Finley et al., 2 Pet. R. 586; Emory v. Greenough, 3 Dal. R. 369; and consequently, it is to be expected, that as in the interpretation of foreign contracts, the *lex loci contractus* will be regarded; Smith v. Mead, 3 Conn.

R. 253; Hammett v. Anderson, Id. 304; while in the execution of the contract, the *lex fori* will prevail; White v. Canfield, 7 Johns. R. 117; Whittemore v. Adams, 2 Cow. R. 626; Lowden et al. v. Moses, 3 McC. R. 93; Ayres et al. v. Audibon, 2 Hill's (So. Car.) R. 601. In accordance with this, we find, that a contract made in one state is not affected by the discharge of the debtor under the insolvent law of another state; Cook v. Moffat et al., 5 How. R. 295; Smith v. Mead, 3 Conn. R. 253; Hammett v. Anderson, Id. 304; Fisher et als. v. Wheeler et al., 5 La. Ann. R. 271; Judd v. Porter, 7 Maine R. 337; Palmer v. Goodwin, 32 Id. 535; Larrabee v. Talbott, &c., 5 Gill's R. 426; Glenn v. Gill, 2 Md. R. 18; Owens et als. v. Bowie et al., &c., Id. 457; Van Raugh v. Van Arsdale, 3 N. Y. T. R. 154; Van Hook v. Whittock, 26 Wend. R. 53; Hicks v. Hotchkiss et als., 7 Johns. Ch. R. 297; Wyman v. Mitchell, 1 Cow. R. 316; Bizziel v. Bedient, 2 Car. L. Repos. 254; and, that a discharge from imprisonment in one state, cannot be of any avail in an action brought in the courts of the United States, or the courts of any other state than that where the discharge was obtained; Ogden v. Saunders, 12 Wheat. R. 213; Clay v. Smith, 3 Pet. R. 411; United States v. Wilson, 8 Wheat. R. 253; Woodhull et al. v. Wagner, 1 Baldw. R. 296; Shaw v. Robbins, 12 Wheat. R. 369; Glenn v. Humphreys, 4 Wash. C. C. R. 424; Babcock v. Weston, 1 Gallis. R. 168; Hinkley v. Mareau, 3 Mas. R. 88; Beers v. Haughton, 9 Pet. R. 330; Suydam et al. v. Broadnax et al. adm'rs., 14 Id. 67; King v. Riddle, 7 Cranch's R. 168; Woodbridge v. Wright et al., 3 Conn. R. 523; Norton v. Cook, 9 Id. 314; Watson v. Browne, 10 Mass. R. 337; Frey v. Kirk, 4 Gill & Johns. R. 509; Fiske v. Foster, 10 Metcf. R. 597; Ilsley v. Merriam, 7 Id. 242; Clark v. Hatch, Id.

additions, of a previous statute for the same purpose (*b*), by which the laws then existing on the subject were amended and consolidated. The relief afforded to the debtor is his discharge from prison; and the act accordingly only applies to persons in actual custody within the walls of a prison in England. Any such person in custody upon any process whatsoever, for or by reason of any debt, damages, costs, sum or sums of money, or in consequence of contempt of any court what-

(*b*) Stat. 7 Geo. IV. c. 57, continued and amended by stat. 11 Geo. IV. & 1 Will. IV. c. 38.

455; Wood et al. v. Malin, 5 Halst. R. 100; Miller v. Hall, 1 Id. 229; Thompson 208; Vanuxem et al. v. Hazlehursts, 1 v. Young, Id. 294. This inconsistency South. R. 202; Smith, adm'r v. Smith, 2 however, proceeds from a comity between Johns. R. 235; White v. Canfield, 7 Id. the different States, by which the same 117; Sicard v. Whale, 11 Id. 194; Mather regard is paid by one State to the insolvent et al. v. Bush, 16 Id. 233; Whittemore v. laws of a sister State, as that State would Adams, 2 Cow. R. 626; Peck v. Hozier et al., 11 Johns. R. 346; James et al. v. pay to the insolvent laws of the former State. By a reference to Walsh v. Nourse, 5 Allen, 1 Dal. R. 206; Ayres et al. v. Audibon, 2 Hill's (So. Car.) R. 601. Some says—"If this matter is considered on cases, however, have held, that if the discharge has been granted by the state in which the contract was made, it will remain good even against a resident of another state; Blanchard v. Russell, 13 Mass. R. 1; Proctor v. Moore, 1 Id. 198; Braynard v. Marshall, 8 Pick. R. 194; Savoye et als. v. Marsh et als., 10 Id. 594; Pugh v. Bussel, 2 Blackf. R. 394.

But there is a class of cases, which would at first sight seem to be inconsistent with the decisions above quoted; thus, a discharge obtained in Maryland, or Pennsylvania, or New York, has been held good in Delaware; Lewis v. Norwood, 4 Harring. R. 460; Fisher v. Stayton, 3 Id. 271; Beeson v. Beeson's adm'rs, 1 Id. 466; Bailey v. Seal's Special Bail, Id. 367; so, also, a discharge obtained in Pennsylvania has been held good in New Jersey; Rowland et al. v. Stevenson, 1 Halst. R. 149; and in the same state a discharge obtained in New York upon a contract made in Pennsylvania, has been held good; Hale v. Ross, Penning. R. 590; and see further for analagous cases: Hempstead v. Reed, 6 Conn. R. 480; Hicks v. Brown, 12 Johns. R. 142; Hare exec. v. Monetrie, 2 Yeat. R. 435; Donaldson v. Chambers, 2 Dal. R. 100; Miller v. Hall, 1 Id. 229; Thompson v. Young, Id. 294. This inconsistency however, proceeds from a comity between the different States, by which the same regard is paid by one State to the insolvent laws of a sister State, as that State would pay to the insolvent laws of the former State. By a reference to Walsh v. Nourse, 5 Bin. R. 381, where Chief Justice Tilghman says—"If this matter is considered on principle, it is not easy to discover by what authority any state can by its laws affect a debt contracted in another state, where the creditor is residing. I mean how it can affect the debt so as to prevent the creditor from bringing an action in another state. Every state has power over the persons residing within its territory, and therefore where a debt is discharged by the law of a state in which both plaintiff and defendant reside, another state ought to pay regard to it. Repeated decisions by my predecessors in this court, have placed the law on a footing somewhat different from the principle I have mentioned. Our rule has been to pay the same regard to the insolvent laws of our sister states which their courts pay to ours. If the matter were to be taken up anew, I should be for adhering to what I consider the true principle. But not without considerable reluctance, I have thought myself bound by former decisions, as I have declared in the case of Boggs and Davidson v. Teackle," &c. : and see also, Mount v. Bradford, 1 Miles' R. 17; Fisher v. Hyde, 3 Yeat. R. 256; Smith v. Brown, 3 Bin. R. 201; Boggs et al. v. Teackle, 5 Id. 332; Hilliard et al. v. Greenleaf, Id. 336, and note.

soever for non-payment of money or costs, taxed or untaxed, may at any time within the space of fourteen days next after the commencement of his actual custody, *or afterwards by permission of the court, apply by petition to the Court for the Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of the act(c). In the country the petition is now referred for hearing to the County Court of the district within which the insolvent is in custody (d). The insolvent himself was formerly the only person who could put the machinery of the act in motion; but now the creditor at whose suit the prisoner is committed to prison or charged in execution may, if not satisfied within twenty-one days next after such prisoner shall be so committed or charged in execution, himself petition the court for his share of the relief(e), which consists in the real and personal estate and effects of the prisoner being vested in the provisional assignee of the court for the benefit of his creditors.

On the filing of the petition either of the debtor or of the creditor, a vesting order, as it is termed, is made by the court. By this order all the real and personal estate and effects of the prisoner, both within this realm and abroad (except his wearing apparel, bedding and other such necessities of himself and his family, and his working tools and implements, not exceeding in the whole the value of twenty pounds), and all the future estate to which he may become entitled until his final discharge, are vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England(f). The court may subsequently appoint any proper person or persons to be assignees of such *estate and effects, in whom the same will accordingly vest on the acceptance of the appointment being signified by him or them to the court(g). The estate and effects of the prisoner are then sold and converted into money by the assignees in the manner directed by the act(h). And the court has power to order that any property of the prisoner may be mortgaged, instead of being sold, if it shall appear to the court that his debts can be dis-

(c) Stat. 1 & 2 Vict. c. 110, s. 35.

(d) Stat. 10 & 11 Vict. c. 102, s. 10.

(e) Sect. 36. In this case, however, the Insolvent Court has no adequate means of compelling the prisoner to file a schedule of his property. *Hollis v. Bryant*, 12 Sim 492, 501.

(f) Stat. 1 & 2 Vict. c. 110, s. 37; *Ford v. Dabbs*, 5 Man. & Gr. 309.*

(g) Stat. 1 & 2 Vict. c. 110, s. 45.

(h) Sect. 47. See *Wright v. Maunder*, 4 Beav. 512,

charged by such means (*i*). If the insolvent be a beneficed clergyman, the assignees may obtain a sequestration of the profits of the benefice for the payment of his debts (*k*). And if the insolvent be or have been an officer under government, or in the service of the East India Company, a portion of his pay, half-pay, salary, emoluments or pension, may, with the written consent of the chief officer of the department to which he belongs or may have belonged, be ordered to be paid to the assignees (*l*). The produce of the insolvent's estate is then divided by the assignees rateably amongst the creditors (*m*). And if any prisoner shall before or after his imprisonment, being in insolvent circumstances, voluntarily convey, charge or make over any of his estate to or in trust for any creditor or creditors, every such transaction is declared to be fraudulent and void as against the assignees, if made within three months before the commencement of the party's imprisonment, or with the view or intention on his part of petitioning the court for his discharge under the act (*n*).

Within fourteen days next after the making of the vesting order, or [*136] within such further time as the court *shall think reasonable, a schedule is required to be delivered in to the court, signed by the prisoner, containing a full description of his name, trade or profession, place of abode, debts and property of every description (*o*). Immediately after the filing of this schedule, a time and place are appointed by the court for the prisoner to be brought up to be dealt with according to the act (*p*), of which due notice is given to the creditors (*q*). His schedule is then examined into on oath by the court; and any creditor may oppose his discharge, and for that purpose may put such questions to the prisoner, and examine such witnesses, as the court shall think fit (*r*). After such examination the court is then empowered, upon the prisoner swearing to the truth of his schedule, and executing the warrant of attorney to be mentioned afterwards, to adjudge that such prisoner shall be discharged from custody, and entitled to the benefit of the act as to the several debts and sums of money mentioned in the schedule, due or claimed to be due, at the time of making the vesting order, from the prisoner to the persons

(*i*) Sect. 48.

(*k*) Sect. 55. See stat. 12 & 13 Vict. c. 67.

(*l*) Stat. 1 & 2 Vict. c. 110, s. 56.

(*m*) Sect. 62.

(*n*) Sect. 59. See *Harris v. Lloyd*, 6 Beav. 426; *Jackson v. Thompson*, 2 Q. B. 887; * 3 Man. & Gr. 621.*

(*o*) Sect. 69.

(*p*) Sect. 70.

(*q*) Sect. 71.

(*r*) Sect. 72.

named in his schedule, or for which such persons shall have given him credit before the time of making such vesting order, and which were not then payable, and as to the claims of all other persons, not known to the prisoner at the time of the adjudication, who may be indorsees or holders of any negotiable security set forth in the schedule (s). The discharge may, in the discretion of the court, either be immediate, or may be postponed for six months (t), and in certain cases of flagrant misconduct it may be postponed for any period not exceeding three years (u).

The insolvent being thus discharged is free from any *future [*137] imprisonment, and his property is also free from execution, at the suit of his creditors, for the debts mentioned in the schedule (x). And the costs of actions and suits (y), and the claims of annuity creditors (z), may be comprised in such discharge. The discharge, however, is not, like that of bankruptcy, final and complete; for before any adjudication is made, the prisoner is required to execute a warrant of attorney, authorizing the entering up of a judgment against him in one of the superior courts at Westminster, in the name of the assignee or assignees, for the amount of the prisoner's unsatisfied debts as stated in the schedule. And if at any time it should appear to the satisfaction of the court that the prisoner is of ability to pay such debts, or any part thereof, or that he is dead leaving assets for that purpose, the court may permit execution to be taken out upon the the judgment for such sum as it may order, such sum to be distributed rateably amongst the creditors (a).

Under certain circumstances an insolvent may now, by recent acts of parliament, obtain as complete a discharge from his debts as if he had become bankrupt (b). The acts however only apply to such persons as have become indebted without any fraud, or gross or culpable negligence. Accordingly, no person is allowed to take the benefit of such acts if his debts have been contracted by any manner of fraud or breach of trust, or any prosecution whereby he has been convicted of any offence, or without having, at the the time of becoming indebted,

(s) Sect. 75. *Leonard v. Baker*, 15 Mee. & Wels. 202.*

(t) Sect. 76.

(u) Sects. 77, 78.

(x) Sects. 90, 91.

(y) Sect. 79.

(z) Sect. 80. See *Bennett v. Burton*, 12 Ad. & Ell. 657.*

(a) Sect. 87. See also sects. 88 and 89.

(b) Stats. 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102.

a reasonable or probable expectation of being able to pay the debts; or if such debts were contracted by reason of any judgment in any [*138] proceeding for breach of the *revenue laws; or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out of a fiat in bankruptcy, or malicious trespass (*e*). With these exceptions, any person indebted, not being a trader within the bankrupt laws, or being such trader, but owing debts amounting in the whole to less than 300*l.*, may, whether he shall have already been in prison or not (*d*), apply for the protection of his person from process, on making a full disclosure and surrender of all his estate and effects for the payment of his debts. The application is now made to the Court for the Relief of insolvent Debtors (*e*). But if the petitioner shall not have resided for the last six calendar months within twenty miles of London, but shall have resided for that time within the district of a County Court, application must then be made to such County Court (*f*). The whole estate and effects of the insolvent are then vested in the provisional assignee of the Insolvent Court, or in the clerk of the County Court, as the case may be, for the benefit of all the creditors rateably (*g*). But the wearing apparel, &c., of the petitioner and his family, not exceeding the value of 20*l.*, may be excepted, as in the other Insolvent Act, provided such excepted articles, and the values thereof, be fully and truly described (*h*). With the exception of the warrant of attorney given by the prisoner under the other Insolvent Act, the provisions of these acts are generally similar to those of that act.

In the reign of Geo. III. an act was passed for the discharge of [*139] debtors in execution upon any judgment *for any debt or damages not exceeding 20*l.*, exclusive of costs (*i*). But as it is now provided that no person shall be taken or charged in execution upon any judgment in any action for the recovery of any debt, wherein the sum recovered shall not exceed 20*l.*, exclusive of cost (*k*), this act may now be considered as almost obsolete.

(*c*) Stat. 5 & 6 Vict. c. 116, s. 4; 7 & 8 Vict. c. 96 s. 24.

(*d*) Stat. 7 & 8 Vict. c. 96, s. 6; 10 & 11 Vict. c. 102, s. 7.

(*e*) Stat. 10 & 11 Vict. c. 102, ss. 6, 8.

(*f*) Ibid. s. 6.

(*g*) Stats. 5 & 6 Vict. c. 116, s. 7; 10 & 11 Vict. c. 102, s. 5.

(*h*) Stats. 7 & 8 Vict. c. 96, s. 9.

(*i*) Stat. 48 Geo. III. c. 123. See *Tolson v. Dykes*, 1 Phillips, 439.

(*k*) Stat. 7 & 8 Vict. c. 96, s. 57.

*CHAPTER VI.

[*140]

OF INSURANCE.

HAVING now considered, though very briefly, the subject of debts generally, there remain certain debts, payable on contingencies, which deserve a separate notice, namely, debts arising under contracts to insure, effected by policies of insurance. A policy of insurance, or assurance, is the name given to the instrument by which a contract to insure is entered into; and a contract to insure is a contract to indemnify against a loss which may arise on the happening of some event, or, in other words, a contract that, on the happening of such event, the insurer shall pay to the party insured a sum of money equivalent to the loss he may have sustained (1). The most usual kinds of insurance are, insurance of *lives*, insurance against loss by *fire*, and insurance of *ships* and their cargoes against the perils of the seas.

(1) The written instrument in which the contract of marine insurance is embodied, is called a *policy* of insurance; 1 Arnould on Ins., 16. It is a printed or written contract, in which the premium, the risk insured against, the names of the underwriters, and the sum insured are to be inserted. *Ib.* Policy is the name given to the instrument by which the contract of indemnity is effected between the insurer and insured; and it is not, like most contracts, signed by both parties, but only by the insurer, who on that account, it is supposed, is denominated an underwriter; Park on Ins., 1.

Insurance is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks. Marine insurance is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight or cargo, subject to the risks of marine navigation, another undertakes to indemnify him against some or all of those risks during a certain period or voyage. The other species of insurance most in use, are

those against loss by fire on land, and loss of life; 1 Phill. on Ins. 1.

Mr. Justice Lawrence says: "The contract of insurance is applicable to protect men against uncertain events, which may in any wise be of disadvantage to them." 5 B. & P. R. 301, *Lucena v. Crawford*. See, for sundry definitions of insurance, Mr. Sergt. Coleridge's argument in *Patterson v. Powell*, 9 Bing. R. 320; 1 Phill. on Ins., p. 1, n. (a).

"Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other, that he shall not suffer loss, damage or prejudice, by the happening of the perils specified to certain things which may be exposed to them;" 5 Bos. & Pul. R. 301, *Lawrence, J.*

Insurance may be defined a contract, by which, in consideration of a certain sum, one party agrees to indemnify another against risks incurred in a certain manner during a stipulated period; 48 Law Mag. 251.

And first, as to life insurance (1). The advantages of life insurance are now so well known that there is no occasion to dilate upon them. By payment of a small annual premium during the life insured, a sum of money may be secured at the decease of the party, applicable to the payment of his debts, for a provision for his family, or any other purposes. But as the insurance of lives and other events, in which the person insured had no interest, was found to introduce a mischievous kind of gaming, it was enacted, in the early part of the reign of George III., that no insurance should be made on the life of any person, or on any other event whatsoever, wherein the person for whose use and benefit, or on *whose account such policy shall be made, [*141] shall have no interest, or by way of gaming or wagering; and that every such assurance shall be null and void to all intents and purposes whatsoever (a); and that it shall not be lawful to make any policy on the life of any person, or other event, without inserting in the policy the person's name interested therein, or for whose use or benefit, or on whose account such policy is made (b); and that in all cases where the insured hath an interest in such life or event, no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the insured in such life or other event (c). But this act does not extend to insurances *bonâ fide* made on ships, goods, or merchandizes (d), with respect to which provisions have been made by another act of parliament (e). Every person is considered to have a sufficient interest in the duration of his own life to sustain his own insurance of it; but if he should afterwards put an end to his life, or die by the sentence of the law, the insurance will be void in the hands of his executors; and no provision to the contrary contained in the policy of insurance will be of any avail (f). The assignee of a person who has insured his own life is not required by

(a) Stat. 14 Geo. III. c. 48, s. 1.

(b) Sect. 2.

(c) Sect. 3.

(d) Sect. 4.

(e) Stat. 19 Geo. II. c. 37.

(f) *Amicable Association Society v. Bolland*, 4 Bligh, N. S. 194, reversing *Bolland v. Disney*, 3 Russ. 351; see *Clift v. Schwabe*, 3 C. B. 437.*

(1) Insurance upon life is a contract, by a stipulated sum, or an annuity upon the which the insurers undertake, in consideration of a gross sum paid down, or, as is most usual, of an annual payment, to pay the person for whose benefit the insurance is effected, or the personal representatives of the insured, as the case may be, either death of the party insured, whenever it may happen, if the insurance be made for the whole term of life, or if the insurance be made for a limited period, in case the death of the insured happens within that period; *Ellis on Ins.*, 101.

the above mentioned statute to have any interest in the life of such person, for the statute makes no mention of the assignment of policies (*g*). A creditor has an insurable interest in the life of his debtor to the extent of his debt; but if the debt should be discharged from any other source, the policy will thenceforth be void for want of interest (*h*). This strict law is not however *usually taken advantage of by the assurance officers, who generally pay the sums insured without any inquiry as to the extent of the interest of the party insured in the life on which the insurance has been effected (*i*). An interest as trustee is also sufficient to support a life insurance (*k*). But a father has not such an interest in the life of his son as to warrant an insurance of it for his own benefit (*l*).

Insurance against fire is a contract to indemnify against loss by fire, and is usually renewed from year to year on payment of a premium (1). The person who effects such an insurance must have an interest in the property insured, and he cannot recover beyond the extent of his interest; neither can he assign his policy without the consent of the insurers (*m*). When the building insured is situate within the limits of the Metropolitan Building Acts, any person interested may procure the insurance money, in case of fire, to be laid out in repairs or rebuilding (*n*). A covenant to insure any building within such limits, is therefore tantamount to a covenant to repair to the extent of such

(*g*) *Ashley v. Ashley*, 3 Sim. 149.

(*h*) *Godsall v. Boldero*, 9 East, 72; S. C. 2 Smith's Leading Cases, 157; see, however, *Humphrey v. Arabin*, 1 Lloyd & Goold, Cas. temp. Plunkett, 322.

(*i*) *Lloyd & Goold*, Cas. temp. Sugden, 291.

(*k*) *Tidswell v. Angerstein*, Peake, N. P. Cases, 151; *Collett v. Morrison*, 9 Hare, 162, 176.

(*l*) *Halford v. Kymer*, 10 Barn. & Cress, 724.*

(*m*) *Lynch v. Dalzell*, 4 Bro. Parl. Cas. 431; *Saddlers' Company v. Badcock*, 2 Atk. 554.

(*n*) Stat. 14 Geo. III. c. 78, s. 83. This section is not repealed by stats. 7 & 8 Vict. c. 84, Schedule (A.)

(1) Fire insurance, is a contract in the nature of an indemnity given by the insurers, against such loss or damage by fire as may happen to the insured, in respect of the houses, buildings, stock, merchandise, or other articles covered by the policy; *Ellis on Ins.*, 101.

An insurance against fire, is a contract by which the insurer, in consideration of the premium which he receives, undertakes to indemnify the insured against all losses, which he may sustain in his house, or goods, by means of fire, within the time limited in the policy; 2 *Park on Ins.*, 950.

insurance, and if entered into by a lessee in his lease, will *run with the land* so as to be binding on the assignee of the lease (o).

The insurance of ships and their cargoes from the perils of the seas [*143] is a matter belonging rather to mercantile* law than to the department of conveyancing (1). In this kind of insurance, as well as in the others, an interest in the property insured must generally belong to the party effecting the insurance, if the ship be a British vessel, or the goods be laden on board any such vessel (p). Full information on this subject will be found in Park on Insurance, Arnould on Marine Insurance, Abbott on Shipping, and in the chapter on maritime insurance in the late J. W. Smith's admirable Compendium of Mercantile Law. Connected with maritime insurance are *bottomry* and *respondentia*. Bottomry is an agreement by which a vessel is hypothecated or pledged by the owner for the payment, in the event of her voyage terminating successfully, of money advanced to him for the use of the vessel, together with interest, which interest, in consideration of the risk incurred, is generally far beyond five per cent., formerly the legal rate. Respondentia is a somewhat similar contract with respect to the cargo, except that the borrower only is responsible in the event of the safe termination of the voyage, the lender having no lien on the goods (q) (2). These contracts appear to be of little importance since the relaxation of the usury law.

(o) *Vernon v. Smith*, 5 Barn. & Ald. 1; * see Principles of the Law of Real Property, 316, 2d ed.; 326, 3d ed.

(p) Stat. 19 Geo. II. c. 37, s. 1.

(q) 2 Black. Com. 457.

(1) Marine insurance, is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea risks, to which his ship, merchandize or other interest, may be exposed during a certain voyage, or a certain period of time; 1 Arnold on Ins., 2.

Marine insurance is a contract, whereby, for a consideration stipulated to be paid by one interested in a ship, freight or cargo, subject to the risks of marine navigation, another undertakes to indemnify him against some or all of those risks, during a certain period or voyage; 1 Phill. on Ins., 1.

(2) Bottomry is a pledge of a vessel and its freight, deriving its name from the bottom or keel of the ship.

Respondentia is a pledge of goods laden on board a vessel. Most modern bottomry bonds, however, contain a pledge of ship, freight and cargo. The terms bottomry and respondentia, are, however, often used synonymously. By the civil law writers, this contract is termed, *Bomerie* and *Contrata la grosse*, or, *a la grosse aventure*, *Nauticum foenus* and *Contractus trajectitiæ pecuniæ*. Emerigon gives rather an illustration than a definition of the contract. "The lender," he says, "lends to another a certain sum of money, upon the condi-

tion, that in case of the loss of the effects for which that sum has been lent by any peril of the sea or *vis major*, the lender shall have no recourse except upon what shall remain; 2 Emer. R. 385. Again, "Bottomry is neither a sale, nor a partnership, nor a loan properly so called, nor an insurance. It is different from all the other contracts; it constitutes a particular species;" Id. 389-90. According to Valin, "Bottomry is a contract by which the lender, in consideration, that he will lose his money if the thing upon which he makes the loan should perish by accident, has the right to stipulate an extraordinary interest or profit in case the thing shall arrive safely in port;" Valin, Book 3, tit. V., p. 1. Pothier's definition is more accurate. "The contract of bottomry," he says, "is a contract by which one of the parties, who is the lender, lends to the other, who is the borrower, a certain sum of money, upon the condition, that in case of the loss of the effects for which this sum has been lent, occasioned by some peril of the sea or accident of *vis major*, the lender will not have any recourse unless it is to the extent of what remains, and that in case of a prosperous arrival, or in case it shall not have been prevented by the fault of the master, or of the mariners, the borrower shall be bound to return to the lender the sum lent, with a certain stipulated profit for the price of the risk of the effects of which the lender has charged himself;" Pothier *Traité du Prêt. à le grosse aventure*, § 1, p. 1129.

"The condition of the bottomry loan, and of the obligation of the borrower included in it, exists when during all the time of the risk the effects upon which the loan has been made, have not been taken, nor lost, however damaged they may have been by the accidents of *vis major*; and the borrower, in consequence, is bound;" Id., p. 1133.

"If only a part of the said effects have arrived, and the residue have been taken or lost, the obligation in this case, only exists to the extent of the value of that

which remains, and it is dissolved for the residue;" Id., p. 1134.

It combines the character of a loan and a maritime insurance—the lender being the insurer against maritime risks, and the borrower the assured of his lender. The double office of lender and insurer, gives the latter a right to demand marine interest or *foenus nauticum*, that is, interest greatly beyond the ordinary compensation for the use of money, notwithstanding usury laws, as this interest is a mixed compensation for the use of the money lent, and insurance against loss by marine risks, of the property pledged in bottomry to the extent of the loan.

The origin of the contract is lost in a remote antiquity. It existed before the time of Justinian, and it is treated of in his Digest and Code. It was known among the Romans under the titles of *Nauticum foenus* and *Contractus trajectitiae pecuniae*. It was doubtless derived by the Romans from the Greeks. A speech of Demosthenes is still preserved to us, in which the facts are stated to be, that two fraudulent debtors endeavored to sink the ship on which they were bound, after having failed to fulfil the promise to embark on board her a cargo, hypothecated to the lender of a very considerable sum; and what is still more surprising, Plutarch remarks of Demosthenes, that for him to accept the bribe of Harpalus, was natural enough, as his father had lent money on maritime interest; 48 Law Mag., 252.

Until quite a recent period, almost all the learning on this subject, was to be found in the civil law books. Now, however, bottomry is not looked upon with the dislike which was exhibited towards it in the time of Demosthenes, but on the contrary, the contract is favored, as it is considered, that it is for the general advantage of the shipping interests of the world, that bottomry transactions should not be rendered too difficult. The *Vibelia*, 1 Robinson, Jr. R. p. 1; The *Zodiac*, 1 Hagg. Adm. D. 320; The *Reliance*, 3 Id. 66; The *Rubicon*, Id. 8. Indeed, courts of admiralty in the general

exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity; *The Virgin*, 8 Peters R. 588. *The Hero*, 2 Dod. R. 142. Thus bottomry bonds may be sustained in part, though they may be bad in part; *Abbott on Shipp.*, 159; *The Nelson*, 1 Hagg. Adm. D., 169; and even material mistakes in them may, it seems, be reformed; *The Zephyr*, 3 Mason R. 341; for these bonds are not to be construed strictly, but liberally, so as to carry into effect the intention of the parties; *Pope v. Nickerson*, 3 Story, 465.

There are two classes of bottomry and respondentia bonds, those of the one are made by the owner of the property pledged, while those of the other can only be made by the master of the ship bottomed, or in which the goods are carried. The former are resorted to at the option of the borrower, as a means of procuring money on a ship, or for an adventure; the latter can only be created for the purpose of borrowing money, which cannot be otherwise obtained, and which is necessary to be raised, in order to repair or refit a vessel which has become unseaworthy; *The Packet*, 3 Mason R. 255; *The Gratitude*, 3 Robinson R. 272; they are made by the master of the vessel *virtute officii*, under the authority conferred on him by law, under certain circumstances to pledge his ship, freight and cargo, or any of them, and as a general rule, such loans can only be effected in foreign ports. A bottomry bond may be given by a substituted master, to the consignee of the vessel who had appointed him; *The Rubicon*, 3 Hagg. 9.

The essential requisites of a bottomry bond:

There is no particular form necessary. Any contract in language setting forth the fundamental properties of bottomry, will be sufficient evidence to sustain the contract. "We have not," says Emerigon, "any printed form of the contract of bottomry, the draft of it is made in the form which the parties find appropriate. It is sufficient that they express themselves without equivocation; that they insert the usual clauses, and that they stipulate

nothing which is contrary to the nature of the contract;" 2 Emerigon, 400. The particular voyage on which the vessel is bound, need not be stated; *The Jane*, 1 Dods. R. 461. And like all other contracts, as to its form, it must comply with the law of the place where it is entered into; *The Nelson*, 1 Hagg. Ad. D. 169. Sometimes an instrument in the form of a bond, at others in the form of a bill of sale, at others of a different shape, is made use of;" *Abbott on Shipp.*, 158. There must be risk incurred by the lender. "Navigation," says Emerigon, 2 Vol. 39, "forms the only object of bottomry. If nothing has been exposed to the perils of the sea, the contract has never been bottomry;" See also *Jennings v. The Ins. Co. of Penna.*, 4 Binn. R. 244. But Ch. J. Tilghman there distinguished the case before him, which was a contract stipulating for more than legal interest, from such an agreement, made to secure a loan with legal interest, and refused to express an opinion as to such an agreement. The fact that a bottomry bond only bears interest at the ordinary rate, is a reason for presuming that sea risk was not contemplated; *The Emancipation*, 1 Robinson, Jr., R. 124; *The Hero*, 2 Dod. R. 142. But, although there can be no valid bottomry contract to secure a loan, unless the lender shall agree to incur sea peril, yet the risk may be assumed for any given voyage, or for any definite time; *Valin* 4, *The Draco*, 2 Sumner R. 157.

As a general proposition of law, it is undoubtedly true, that a deed extorted by actual duress is invalid; and this principle of law would clearly extend to vitiate a bond of bottomry compulsorily obtained by duress from the master, even although the advances were made upon the promise of a future bond, and the bond itself was taken as a fulfilment of that promise. But it does not follow that such an instrument, executed while the master is imprisoned, though at the suit of the bondholder, was executed under duress, and therefore void; *The Heart of Oak*, 1 W. Robb. 213.

When the bond is made by a master *virtute officii*, it must *ordinarily* be given in a port of a country foreign to the owners of the vessel. But this may be a port sought by a vessel in distress as an asylum, called a port of necessity; or it may be the port of destination of the vessel; *Reade v. The Commercial Ins. Co.*, 3 Johns. R. 352. There are, however, some exceptions to this rule, as where the master, though in a domestic port, has no means of communicating with his owners; *La Ysabel*, 1 Dods. R. 273, or where the owners have become insolvent; *The Trident*, 1 Robinson, Jr., 29. In short the place where the vessel is, provided she is on a voyage and is in distress, is of no further importance, than, that, generally speaking, unless the vessel is in a foreign port, there will be no necessity, and hence no right on the part of the master, to raise money by a pledge of the ship and cargo, or of either. The general principle, that bottomry bonds can alone be given for the furtherance of the voyage in which the vessel is actually engaged, is not affected by the circumstance, that by the law of the country where she is seized, the vessel may be arrested and sold for any debt owing by the owner to a creditor residing in that country; *The Osmanli*, 3 W. Robb. 198.

Another requisite of the contract when made by a master is, that there must be a necessity for the loan on bottomry. If the repairs and supplies are in a just sense necessary, then it is clear, that if the master has no other means of meeting the expenditure, he may take the money therefor upon bottomry; *The Ship Fortitude*, 3 Sumner R. 228; *Greely v. Smith*, 3 W. & M. R. 236.

1. There must be a necessity for the supplies and repairs for the safety and security of the vessel, or to enable her to prosecute her voyage; *The Aurora*, 1 Wheaton R. 103.

The necessary repairs for which a vessel may be bottomried, mean such as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety

of the ship or accomplishment of the voyage. The money advanced should at the time *appear* to be needed for the supplies or repairs, but all that the law requires, is an apparent necessity. A bottomry bond may be given to pay off a former bond, and if such former bond was valid, the latter will be so likewise; *The Aurora*, 1 Wheat. 26. It would seem not to be incumbent upon a foreign merchant advancing money upon bottomry for the repairs of a vessel, to calculate the expediency of such repairs; *The Vibelia*, 1 W. Rob. 10.

A public advertisement for the sale of a bottomry bond, by auction, to the lowest bidder, at a foreign port, will not discharge a *bonâ fide* purchaser from the necessity of making reasonable enquiry as to the actual existence of "an unprovided necessity." Such "an unprovided necessity" is essential to the validity of a bottomry bond, and therefore the want of it will render a bond void, even against a *bonâ fide* vendor ignorant of all the circumstance; *The Prince of Saxe Cobourg*, 3 Hagg. 387.

2. There must be an inability on the part of the master to procure funds of the owner, or funds on the personal credit of the owner at the port of distress. It seems to be an open question, whether the bond would be valid if the master has the requisite funds, or could procure them on his own credit; *Abb. on Ship.* (Ed. 1846) 200. A bottomry bond by a master is not valid, unless it has been given to enable the vessel to leave a port where she is detained, either for necessary repairs or for claims upon her, the master having there no funds nor credit, nor means of getting money; *Gibbs v. The Texas Crabbe*, 236.

But the necessity of the supplies and repairs being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. It is no objection that the owner had funds in the hands of his consignees, at the same port,

provided the master applied for and could not obtain them. The non-existence of funds, and the inability to get at them, must be deemed precisely equal predicaments of distress. Nor is it an objection that the supplies and repairs were in the first instance made upon the master's credit. The lender may well trust to the credit of the master, as auxiliary to the lien, which the foreign law would give on the ship, or the general responsibility of the owners. And the fact that the master ordered the supplies and repairs before the bottomry bond was given, can have no legal effect to defeat that security, if they were so ordered by the master, upon the faith and with the intention, that a bottomry bond should ultimately be given to secure the payment of them; *The Virgin*, 8 Peters R. 538. A bottomry bond may be valid, though the money was not advanced in one sum nor at the same time, the bond was given. If advanced before the bond was made, or in separate sums, it is only necessary, that it should have been advanced on the faith and understanding, that the bottomry security was to be given; *La Ysabel*, 1 Dodson R. 273; *The Virgin*, 8 Peters R. 538. Such a bond to be valid, should be given for repairs or outfits of a vessel, and not for a pre-existing debt; and should appear to be risked on the vessel, and not on the personal liability of the owner; *Greely v. Smith*, 3 Wood and Minot, 236. But small advances, originally made without any express stipulation for a bond, but followed by a bond of bottomry, may be included in the bond; *The Trident*, 1 W. Rob. 34. And though a loan upon personal credit cannot be changed into a loan upon bottomry, it is a totally different thing from this, to take a bottomry bond for a loan, where the money was at first advanced on the security of a lien, or the right of lien on the ship; *The Ship Vibelia*, 1 Robinson, Jr. R. p. 1. And in ascertain-

ing the original character of the loan where the question is personal credit or not, the law of the place where the advances have been made, may be properly invoked, if that law gives a lien for the advances, because it renders the contemplation of bottomry security more probable than it would otherwise be, by furnishing a presumption against the contracting of the loan on mere personal credit; *E La Ysabel*, 1 Dodson R. 273; *The Alexander*, 1 Dodson R. 280; *The Virgin*, 8 Peters R. 538.

The lender is always expected to prove by other evidence than the bond, that the money was lent, and that the repairs were made and the materials furnished to the amount claimed, and that they were necessary to enable the vessel to perform her voyage, or for her safety; *Crawford v. The William Penn*, 3 Wash. C. C. R. 354, but it is not necessary further to prove that the money lent was actually employed in repairing or refitting the vessel; *Cunard v. The Atlantic Ins. Co.*, 1 Peters R. 436; *The Jane*, 1 Dods. R. 461.

Where once the transaction is shewn to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit is beyond question, and the bond in all essentials is correct; the strong presumption of the law, under such circumstances, is in favor of its validity, and this is not to be impugned without clear and conclusive evidence of fraud, or unless it shall be proved beyond all doubt, that although the contract is in form a bottomry transaction, the money was in fact advanced on different considerations; *The Vibelia*, 1 Robinson, Jr. R. 1.

And *prima facie*, and until the contrary is shown, the master is presumed to have acted with good faith, upright intentions, and reasonable diligence; *The Fortitude*, 3 Sumner R. 228.

*CHAPTER VII.

[*144]

OF ARBITRATION (1).

INSTEAD of the ultimate remedy of an action at law or suit in equity, recourse is sometimes had for the settlement of disputes to the more

(1) The laws of all the States contain provisions on the subject of arbitration and reference; and in almost all of them, any personal controversy, whether litigated or not, may be referred under a rule of court; this is the case in Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Hampshire, New Jersey, Ohio, Tennessee, Vermont, Virginia and Pennsylvania. In Maine, Massachusetts and New York, any personal controversy may be made the subject of arbitration. The statutes of Delaware and Texas allow a reference of any matter in litigation; and those of Arkansas, authorize a reference, by agreement in writing, in cases where no suit is pending. In general, there is no necessity for the choice of an umpire, as the statutes either direct the arbitrators to be of an uneven number, or else allow them to be so chosen; thus, in Florida, Kentucky, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Ohio and Vermont, the dispute may be referred to one or more persons; if one only should be chosen, he is of course the umpire, but it is customary to choose an uneven number at first, obviating the necessity of an umpire. In Arkansas any number of referees, not exceeding five, may be chosen, while in Delaware the number is fixed at three. The laws of Texas and Louisiana, regulating arbitrations and awards, prescribe the manner of choosing an umpire; the former requiring, that where one is chosen it shall be at the same time with the original arbitrators; and the latter, on the contrary, giving power to the arbitrators themselves to appoint an umpire subsequently, although it also allows the parties, at discretion, to fix upon their umpire at the time the other arbitrators are appointed.

In California, all or any of the issues in an action, whether of fact or law, may be referred upon the written consent of the parties, and even where the parties do not consent, the court may, upon the application of either, or upon its own motion, except where difficult questions of law are likely to arise, refer all matters of account, or any question of fact not contained in the pleadings, which may arise in the course of the action. The parties may choose any number of arbitrators not exceeding three, and if the parties cannot agree, the court shall appoint the arbitrators, but not more than three in number.

The Pennsylvania systems of arbitration are peculiar, being in number no less than six, five of which are by agreement of the parties, and the sixth at the pleasure of either, and commonly called the compulsory rule of arbitration. In the case of *Williams v. Craig*, 1 Dal. R. 313, Chief Justice McKean gives a description of four of these kinds of reference in the following words:—"There are four species of awards, *first*, those made by mutual consent, in pursuance of arbitration-bonds entered into out of court; *secondly*, those which are made in a cause depending in a court of law or equity, upon consent of the

amicable expedient of arbitration. And in some transactions, especially in articles of co-partnership between traders, it is usual to stipulate

parties to refer the matter in variance, (which are awards at common law); *thirdly*, those which are made under a rule of court, by virtue of the statute of 9 & 10 Will. 3, c. 15, which was calculated to remedy the delay and circuitry of action attendant upon awards made merely in pursuance of arbitration-bonds, without the intervention of a controlling power to compel the acquiescence of the parties. These are the only awards in use at this day in England; but the legislature of Pennsylvania, in the year 1705, introduced another species here, which are, *fourthly*, those awards, or reports, that are made in pursuance of the act of assembly, setting forth, that 'when the plaintiff and defendant consent to a rule of court for referring the adjustment of their accounts to certain persons, mutually chosen by them in open court, the award, or report, of such referees being made according to the submission of the parties, *and approved by the court*, and entered upon the record, or roll, shall have the same effect, and be as available in law as a verdict by twelve men.' 1 State Ls. 48; 4 Ann, c. 36; Act of 1705; 1 Sm. Laws, 50.

"This act differs essentially from the statute of Will. 3, in many respects, but particularly, that to render a report, or award, valid and effectual, the former requires, that it be *approved by the court*; but no such provision is made by the latter, and, therefore, awards under rules of court, are conclusive in England, unless some corruption, or other misbehaviour, in the arbitrators is proved. The courts of equity, indeed, have taken a wider ground, and wherever a plain error appears, either in matter of fact or law, it seems, they will make it an object of inquiry; 2 Vern. 705; 1 Vern. 157; 3 Atk. 494. From some expressions in the authority, we might presume, that the error must be apparent on the award; but as the chancellor, at the same time, speaks generally, that it

must be set forth in the bill for relief, there is, at least, great room to doubt upon the subject.

"In Pennsylvania, however, since the revolution, as the approbation of the court is made a necessary ingredient in the confirmation of reports, we have thought it our duty, from time to time, to enquire into the allegations against them, before we gave them our sanction. But in doing this we have always confined ourselves to two points; *first*, whether there is an evident mistake in matter of fact; or, *secondly*, whether the referees have clearly erred in matter of law. If either of these is satisfactorily proved, the argument is, surely, as strong for setting a report aside, as where injustice has been done by the corruptions, or other misconduct of the referees."

The fifth species of award is that created by the Act of the 21st of March, 1806, (4 Sm. Ls. 326,) wherein it is provided, "That it shall be lawful for any person or persons desirous of settling any dispute or controversy, by themselves, their agents or attorneys, to enter into an agreement in writing, to refer such dispute or controversy to certain persons to be by them mutually chosen," &c. By the 3d section of the Revised Act of 1836, on the subject of voluntary arbitrations, a new modification of the voluntary system is introduced, it being enacted, that "It shall be lawful, also, for the parties to any suit to consent, as aforesaid, to a rule of court, for referring all matters of fact in controversy in such suit to referees, as aforesaid, reserving all matters of law arising thereupon for the decision of the court, and the report of such referees, setting forth the facts found by them, shall have the same effect as a special verdict, and the court shall and may proceed thereupon, in like manner as upon a special verdict," &c.

The last species of award, being the compulsory system, authorizes *either* party to

that if any dispute shall arise, it shall be referred to the determination of two indifferent persons as arbitrators, or of their umpire, who is

enter a rule of reference, and regulate the proceedings on arbitration; the provisions of this system will be found in the acts of 20th March, 1810, (5 Sm. Laws, 181); 25th of February, 1818, (6 Sm. Laws, 28); 28th of March, 1820; and the revised act on compulsory arbitration of the 16th of June, 1836. This system originated from the violent opposition at one time felt in Pennsylvania to the common law; it is alluded to by Mr. Duponceau in his Treatise on Jurisdiction, page 102, thus, "In Pennsylvania it was for some time believed that the legislature would abolish the common law altogether. Violent pamphlets were published to instigate them to that measure. The whole, however, ended in a law for determining all suits by arbitrators in the first instance, at the will of either party."

By the voluntary system of arbitration, in Pennsylvania, any person or persons may be chosen as arbitrators by the parties; and by the compulsory system, the number of arbitrators is to be either three or five, and if they cannot agree the discretion of appointing is left with the prothonotary of the court; but the parties may agree to refer the dispute to one person; and the act of 1836, contains precise directions as to the practice of appointing arbitrators or an umpire.

On the general subject of statutory arbitration, and the practice therein, see the following cases: *Beverly et al. v. Stevens*, 17 Alab. R. 701; *Gerrish et al. v. Ayres et al.*, 3 Scam. R. 245; *Niles v. The Board of Commissioners of the Sinking Fund*, 8 Blackf. R. 158; *Anderson v. Farnham et al.*, 34 Maine R. 161; *Dickey v. Sleeper*, 13 Mass. R. 244; *Coffin v. Cottle*, 4 Pick. R. 454; *Shearer v. Mooers*, 19 Pick. R. 308; *Scudder v. Johnson*, 5 Misso. R. 551; *Bowes v. French*, 11 Maine R. 182; *Craig v. Craig*, 4 Halst. R. 198; *Ferris v. Mann*, 2 Zab. R. 161; *Freeborn v. Denman*, 3 Halst. R. 116; *Ex parte Vasques*, 5 Cow.

R. 29; *Dodge v. Waterbury et al.*, 8 Cow. R. 136; *Wells v. Dain*, 15 Wend. R. 99; *Waugh v. Mitchell*, 1 Dev. & Bat. Eq. R. 521; *Large v. Passmore et al.*, 5 Serg. & Raw. R. 51; *Todd v. Rough*, 10 Id. 18; *Horton v. Stanley*, 1 Miles's R. 418; *Pennington v. Rowman*, 10 Wat. R. 283; *Ford v. Keen*, 1 Har. R. 179; *Gibson v. Broadfoot*, 3 Desauss. R. 584; *Parnell v. King et al.*, Rice's R. 376.

But the fact that the statutes of a State have provided a method of arbitration and reference, does not abrogate the common law system, which will still remain in existence unless expressly abolished; *Martin v. Chapman*, 1 Alab. R. 278; *Byrd v. Odeur*, 9 Id. 755; *Titus v. Scantling*, 4 Blackf. R. 90; *Tyler v. Dyer*, 13 Maine R. 41; *Mooer's adm'r v. Allen*, 35 Id. 276; *Camp et al. v. Root*, 18 Johns. R. 22; *Wayne v. Elderkin*, 1 Chandler's (Wiscons.) R. 219; *Wells v. Lain*, 15 Wend. R. 99; *Valentine v. Valentine et al.*, 2 Barb. Ch. R. 430; *Gray v. Wilson*, 4 Wat. R. 39; *Graham et als. v. Hamilton*, 1 Bin. R. 461; *Graham v. Graham*, 9 Barr's R. 254; *S. C. 2 Jones's*, 128; and, where an arbitration is had under the common law, an umpire may of course be chosen, if a necessity for one should arise, as well as in those cases where the statutes of the State make provision for the election of an umpire, and he will be subject to the regulations of the common law on that subject, unless the laws of the State provide otherwise; *Ramsey v. Edwards*, 17 Conn. R. 309; *Falconer v. Montgomery*, 4 Dal. R. 232; *Passmore v. Pettit et al.*, Id. 271; *Crabtree v. Green*, 8 Geo. R. 8; *Keans v. Rankin*, 2 Bibb's R. 88; *Tyler v. Webb*, 10 B. Mon. R. 123; *Knowlton v. Horner*, 29 Maine R. 552; *Rigden v. Martin*, 6 Har. & Johns. R. 403; *McKinstry v. Solomons*, 2 Johns. R. 57; *S. C. 13 Id. 27*; *Van Courtlandt et als. v. Underhill et al.*, 17 Id. 405; *Butler v. The Mayor, &c., of New York*, 1 Hill's (N. Y.) R. 489; *Boyer v. Aurand*, 2 Wat. R. 74;

usually and very properly required to be chosen by the arbitrators before they proceed to take the subject in question into consideration (a). And it is agreed that the award in writing of the arbitrators,

(a) See *Bates v. Cooke*, 9 Barn. & Cress. 407, 408.*

Graham v. Graham, 9 Barr's R. 254, S. C. 2 Jones's 128; *Sharp v. Lipsey*, 2 Bail. R. 118; *Pack v. Wakeley*, et al., 2 McCord's R. 279; *Shields v. Penn*, Overt. R. 313; *Richards v. Brockenborough's adm'r*, 1 Rand. R. 449; *Rison v. Berry*, 4 Id. 275; *Bassett's adm'r v. Cunningham's adm'r*, 9 Gratt. R. 684. This kind of submission may be revoked at any time before the award is made; *Martin v. Chapman*, 1 Alab. R. 278; *Randel v. Chesapeake, &c., Canal Co.*, 1 Harring. R. 235; *Peters' adm'r v. Craig*, 6 Dana's R. 307; *Allen v. Watson*, 16 Johns. R. 205; *Frets v. Frets*, 1 Cow. R. 335; and it is *ipso facto* revoked by the death of either party; *Mooer's adm'r v. Allen*, 35 Maine R. 276; *Ferris v. Mann*, 2 Zab. R. 161; *Freeborn v. Denman*, 3 Halst. R. 116; *Frets v. Frets*, 1 Cow. R. 335; *Tyson v. Robinson*, 3 Ired. R. 333; unless there should be an agreement to the contrary; *Bailey v. Stewart*, 3 Wat. & Serg. R. 560; but where the reference is made a rule of court, the death of one of the parties will not revoke it, if the cause of action survives; *Bacon v. Crandon*, 15 Pick. R. 79; *Tyson v. Robinson*, 3 Ired. R. 333; but see contrary to this last, *Power v. Power*, 7 Wat. R. 205, which decides that a submission even by a rule of court, is, like any other naked authority, countermandable. An award, however, which has been accepted or carried into effect, bars all further action; *Kendall v. Stokes et al.*, 3 How. (U. S.) R. 87; *United States v. Ames*, 1 Wood. & Min. R. 76; *Martin v. Chapman*, 1 Alab. R. 278; *Gerrish et al. v. Ayres et al.*, 3 Scam. R. 245; *Coleman v. Wade*, 2 Seld. R. 44; *Patton's adm'r v. Baird*, 7 Ired. Eq. R. 255.

Awards must conform to the submission or agreement by which they are referred; *Daniel v. Daniel's adm'r*, 6 Dana's R. 99; *Anderson v. Farnham et al.*, 34 Maine R.

161; *Reeves v. Goff*, Penning. R. 105; *Young v. Young*, 2 Halst. Ch. R. 450; *Welty v. Lentmyer*, 4 Wat. R. 75; *Coleman et al. v. Lukens*, 4 Wh. R. 347; *Okinson v. Flickinger*, 1 Wat. & Serg. R. 257; *Sharp v. Lipsey*, 2 Bail. R. 113; and, where an award is partly good and partly bad, it will be valid so far as it is good, and void as to the rest, except where the good and bad are so intermingled that the one cannot be separated from the other, in which case the whole award will be bad; *Reynolds v. Reynolds*, 15 Alab. R. 398; *Galway's heirs v. Webb*, Hardin's R. 318; *Dickey v. Sleeper*, 13 Mass. R. 244; as to what is sufficient to set an award aside, see further, *State to the use of, &c., v. Williams*, 9 Gill's R. 172; *Bean v. Farnam*, et al., 6 Pick. R. 269; *Newman v. La-beaume*, 9 Miss. R. 30; *Eaton v. Eaton*, 8 Ired. Eq. R. 102; *Conger v. James*, 2 Swan's R. 213; *Webber v. Ives*, 1 Tyler's R. 441; *Ligon v. Ford*, 5 Munf. R. 10.

In the State of New York, upon a motion to refer a cause then pending, the reference may be opposed on the ground, that a material point of law will arise; *Lusher v. Walton*, 1 Caines' R. 149; *Low v. Hallett*, 3 Id. 82; *Adams v. Bayles*, 2 Johns. R. 374; *Salisbury v. Scott*, 6 Id. 329; *De Hart v. Covenhoven*, 2 Johns. Cas. 402; *Shaw v. Ayrs*, 4 Cow. R. 52; *Anon*, 5 Id. 423.

As to the time within which an award is to be made, see *Minton v. Moore*, 4 Blackf. R. 315; *Shaw v. Pearce*, 4 Bin. R. 485; *Abbot v. Pinchin*, 1 Dal. R. 349; *White v. Puryear*, 10 Yerg. R. 441.

An agreement to arbitrate does not divest courts of their jurisdiction; *Allegre v. Insurance Co.*, 6 Har. & Johns. R. 408; *Haggart v. Morgan*, 1 Seld. R. 422; but see to the contrary, *Monongahela Navigation Co. v. Fenlon*, 4 Wat. & Serg. R. 205.

or of their umpire in case of their disagreement, shall be binding and conclusive on all parties. It is generally also further provided, that in case either party should neglect or refuse for a given time to appoint an arbitrator, the arbitrator chosen by the other party may make an award, which shall be binding on both. It is also usual to provide, that the reference or submission to arbitration shall be made a rule of the Court of Queen's Bench, according to the directions of a statute of Will. III. to be afterwards noticed.

As the courts of law and equity have full jurisdiction on all questions arising out of agreements of any kind, it follows that they retain a jurisdiction over matters which the parties themselves have agreed should be referred to arbitration (*b*). Notwithstanding therefore an *agreement to refer disputes to arbitration, either party may [*145] bring the matter into court (*c*); although if the agreement should contain an express covenant not to sue, and especially if arbitrators be actually named, it seems that such covenant may be effectually pleaded in bar to any suit in equity (*d*.) And without such a covenant, the circumstance of the parties having agreed to refer to arbitration, will induce a court of equity to pause before granting to any of them summary relief on a point which they have expressly agreed to settle by amicable means (*e*). If however one of the parties should, notwithstanding his agreement, refuse to name an arbitrator, the Court of Chancery will not entertain a bill to compel him to do so (*f*), neither will it substitute the master for the arbitrators (*g*); for the court acts only when it has it in its power itself to execute the whole contract in the terms specifically agreed upon (*h*).

The reference of disputes to arbitration appears to have been early adopted by the courts of law, with the consent of the parties to an action, in cases where the matter in dispute could be more conveniently settled in this mode. A verdict was taken for the plaintiff by consent,

(*b*) *Wellington v. Mackintosh*, 2 Atk. 569.

(*c*) *Waters v. Taylor*, 15 Ves. 10, 18; *Mexborough v. Bower*, 7 Beav. 127, 132.

(*d*) *Halfhide v. Fenning*, 2 Bro. C. C. 336; *Dimsdale v. Robertson*, 2 Jones & Lat. 58, 92; see, however, *The Londonderry and Enniskillen Railway v. Leishman*, 12 Beav. 423, 428, 432.

(*e*) *Waters v. Taylor*, 15 Ves. 19.

(*f*) *Wilks v. Davis*, 3 Meriv. 507.

(*g*) *Agar v. Macklew*, 2 Sim. & Stu. 418.

(*h*) *Gervais v. Edwards*, 1 Dru. & War. 80.

subject to the award of an arbitrator agreed upon by the parties, and the reference was made a rule of court. This plan is still continually adopted. The arbitrators and the parties to the reference by this means become subject to the jurisdiction of the court, which has power [*146] to set aside any award which may appear to *have been given unjustly or through mistake of the law; or if the award be valid, its performance may be enforced under the penalty of imprisonment for contempt of court. In order to extend the benefits of this mode of submission to arbitration, to all cases of controversies between merchants and traders or others concerning matters of account or trade or other matters, an act of parliament was passed in the reign of William the third, intituled "An Act for determining differences by Arbitration (*i*)."¹ This Act empowers all merchants and traders and others desiring to end by arbitration any controversy, for which there is no other remedy but by personal action or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons shall be made a rule of any of her majesty's courts of record which the parties shall choose. And it provides, that in case of disobedience to the arbitration or umpirage to be made pursuant to such submission, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court when he is a suitor or defendant in such court. And the process to be issued accordingly shall not be stopped or delayed in its execution by any order, rule, command or process of any other court, either of law or equity, unless it shall be made appear on oath to such court that the arbitrators or umpire misbehave themselves, and that such award, arbitration or umpirage was procured by corruption or other undue means. It is also further provided (*j*), that any arbitration or umpirage procured by corruption or undue means shall be judged void, and be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last *day of the next term [*147] after such arbitration or umpirage is made and published to the parties. The Court of Chancery is a court of record within the meaning of this act (*k*).

Previously to a recent statute either party might have revoked his

(*i*) Stats. 9 & 10 Will. III. c. 15.

(*j*) Sect. 2.

(*k*) *Hemming v. Smimmerton*, 2 Phil. 79.

submission, and thus determined the authority of the arbitrators ; and this may still be done, if the submission relate to criminal matters, which are not within the statute (*l*). But it is now enacted (*m*), that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court or judge's order or order of nisi prius in any action, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of her majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge (*n*). And the arbitrator or umpire is empowered and required to proceed with the reference notwithstanding any such revocation, and to make such award although the person making such revocation, shall not afterwards attend the reference. And the court, or any judge thereof, may from time to time enlarge the term for any such arbitrator making his award (*o*). The court, or any judge, is also empowered under any such reference, by rule or order to command the attendance and examination of witnesses, or the production of any documents (*p*). And if in any rule or *order of reference, or in any submission to arbitration [*148] containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, the arbitrator or umpire, or any one arbitrator, is authorized and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath ; and any witness wilfully and corruptly giving false evidence shall be deemed guilty of perjury, and shall be prosecuted and punished accordingly (*q*). The provisions of this act appear to apply to courts of equity as well as courts of law (*r*). But an express order or agreement that the witnesses shall be examined upon oath is not now necessary, for by the act to amend the law of evidence it is now provided, that every arbitrator or other person having by law or by consent of parties authority to hear,

(*l*) 2 Wms. Saund. 133 e. n. (*d*); *Rex v. Bardell*, 5 Ad. & El. 619; * S. C. 1 Nev. & P. 74.*

(*m*) Stats. 3 & 4 Will. IV. c. 42, s. 39.

(*n*) See *Scott v. Van Sandau*, 1 Q. B. 102.*

(*o*) *Parberry v. Newnham*, 7 Mee. & Wels. 378; * *Parkes v. Smith*, 15 Q. B. 297.*

(*p*) Stats. 3 & 4 Will. IV. c. 42, s. 40.

(*q*) Sect. 41.

(*r*) *Oliver v. Latham*, 1 Phil. 163.

receive and examine evidence, may administer an oath to all such witnesses as are legally called before them respectively (*s*).

The authority of arbitrators is liable to be determined not only by a revocation of the submission, but also by the death of either of the parties previously to the making of the award (*t*). In order to obviate this inconvenience, it is now usual to insert in the order or rule of court, by which reference is made to arbitration, a provision that the death of either of the parties shall not operate as a revocation of the authority of the arbitrators, but that the award shall be delivered to the executors or administrators of the parties, or either of them, in case of their or his decease (*u*). And the same stipulation may [*149] *be effectually made in a submission to arbitration by private agreement (*v*). The bankruptcy of either party is not a determination of a submission to arbitration (*x*).

When no time is limited for the making of the award, it must be made within a reasonable time (*y*); but if a given time be limited, the award must be made within that time, unless the time for making it be enlarged (*z*). And if the award is required to be made and ready to be delivered to the parties by a certain day, it will be considered as ready to be delivered if it be made (*a*), unless the arbitrators should fail to deliver it to either of the parties on request made for that purpose on the last day (*b*). The submission to arbitration frequently contains a power for the arbitrators or umpire to enlarge the time for making the award; and in this case the time may be enlarged from time to time (*c*) by such arbitrators or umpire (*d*), provided the enlargement be made on or before the expiration of the time originally limited

(*s*) Stats. 14 & 15 Vict. c. 99, s. 16.

(*t*) *Cooper v. Johnson*, 2 Barn. & Ald. 394; *Brooke v. Mitchell*, 6 Mee. & Wels. 473.*

(*u*) *Tyler v. Jones*, 3 Barn. & Cress. 144; * *Prior v. Hembrow*, 8 Mee. & Wels. 873; * 2 Wms. Saund. 133 d, n. (*d*).

(*v*) *Macdougall v. Robertson*, 2 You. & Jerv. 11; * S. C. 4 Bing. 435; * 1 Moo. & P. 147.*

(*x*) *Hensworth v. Bryan*, 1 C. B. 131.*

(*y*) *Macdougall v. Robertson*, *ubi supra*.

(*z*) 1 Wms. Saund. 327 a, n. (3).

(*a*) *Bradsey v. Clyston*, Cro. Car. 541.

(*b*) *Brooke v. Mitchell*, 6 Mee. & Wels. 473.*

(*c*) *Payne v. Deakle*, 1 Taunt. 509; *Barrett v. Parry*, 4 Taunt. 658.

(*d*) See *Dimsdale v. Robertson*, 2 Jones & Lat. 58.

for making the award (*e*). And if the submission be made a rule of court, then, whether the arbitrators or umpire have power to enlarge the time or not (*f*), the court, or a judge thereof, has power to enlarge the time under the provisions of the statute above mentioned (*g*). And should no enlargement be formally made, yet the parties may, by continuing their attendance* on the reference, or by recognizing [150] the proceedings under it, virtually empower the arbitrators or umpire to make a valid award subsequently to the time originally limited (*h*).

In proceeding in the business of the arbitration, the arbitrators are bound to require the attendance of the parties, for which purpose notice of the meetings of the arbitrators should be given to them (*i*). But if either party neglect to attend either in person or by attorney after due notice, the arbitrators may proceed without him (*j*). In taking the evidence the arbitrators are at liberty to proceed in any way they please, if the parties have due notice of their proceedings, and do not object before the award is made (*k*). But in order to obviate any objection, they ought to proceed in the admission of evidence according to the ordinary rules of law (*l*). The award should be signed by the arbitrators in each other's presence (*m*), and when made it must be both certain and final. Thus if the award be that one party enter into a bond with the other for his quiet enjoyment of certain lands, this award is void for uncertainty; for it does not appear in what sum the bond should be (*n*). With regard to certainty, however, the rule of law is *id certum est quod certum reddi potest*, and therefore an award that one of the parties should pay the costs of an action is good without fixing the amount of the costs, for that may be ascertained by the taxing officer (*o*). On the question of finality many cases have arisen. If the arbitrators be *empowered* to decide all

(*e*) See Reid v. Fryatt, 1 M. & Sel. 1; Mason v. Wallis, 10 B. & Cress. 107.*

(*f*) Parberry v. Newnham, 7 Mee. & Wels. 378; * Leslie v. Richardson, 6 C. B. 378.*

(*g*) Stat. 3 & 4 Will. IV. c. 42, s. 39.

(*h*) Rex v. Hill, 7 Price, 636.

(*i*) Anon. 1 Salk, 71.

(*j*) Harcourt v. Ramsbottom, 1 Jac. & Walk. 512; Scott v. Van Sandau, 6 Q. B. 237.*

(*k*) Ridout v. Pye, 1 Bos. & P. 91.

(*l*) Attorney-General v. Davison, M'Clel. & Y. 160.*

(*m*) Stalworth v. Inns, 13 Mee. & Wels. 466.*

(*n*) Samon's case, 5 Rep. 77 b.

(*o*) Cargay v. Aitcheson, 2 B. & Cress. 170; * S. C. 3 Dowl. & Ry. 433; 2 Wms. Saund. 293 b, n. (*a*).

[*151] matters in *difference between the parties, the award will not necessarily be wanting in finality for not deciding on all such matters, unless it appear to have been *required* that all such matters should be determined by the award (*p*). If the award reserve to the arbitrators (*q*), or give to any other person (*r*), or to one of the parties (*s*), any further authority or discretion in the matter, it will be bad for want of finality. And if the award be that any stranger to the reference should do an act, or that money should be paid to, or any other act done in favor of, a stranger, unless for the benefit of one of the parties (*t*), such award will be void (*u*). An award, however, may be partly good and partly bad, provided the bad part is independent of and can be separated from that which is good (*v*). But if, by reason of the invalidity of part of the award, one of the parties cannot have the advantage intended for him as a recompense for that which he is to do, according to that part of the award which would otherwise be valid, the whole will be void (*x*). If it should appear on the face of the award that the arbitrators, intending to decide a point of law, have fallen into an obvious mistake of the law, the award will be invalid (*y*). But where subjects involving questions both of law and fact are referred to arbitration, the arbitrators may make an award according to what they believe to be the justice of the case, irrespective of the law on any particular point (*z*).

[*152] *When the submission to arbitration is not made the rule of any other court (*a*), the Court of Chancery, according to the ordinary principles of equity, has power to set aside the award for corruption or other misconduct on the part of the arbitrators, or if they should be mistaken in a plain point of law or fact (*b*). If the submission be made a rule of court under the above-mentioned statute

(*p*) Wrightson v. Bywater, 3 Mee. & Wels. 199; 1 Wms. Saund. 32 a, n. (*a*).

(*q*) Manser v. Heaven, 3 Bar. & Adol. 295.*

(*r*) Tomlin v. Mayor of Fordwich, 5 Ad. & El. 147.*

(*s*) Glover v. Barrie, 1 Salk. 71.

(*t*) Wood v. Adcock, 7 Ex. Rep. 468.*

(*u*) Cooke v. Whorwood, 2 Saun. 337; Adam v. Statham, 2 Lev. 235; Fisher v. Pimbley, 11 East, 188.

(*v*) Fox v. Smith, 2 Wils. 267; Aitcheson v. Cargey, 2 Bing. 199.*

(*x*) 2 Wms Saund. 293 b, n. (1).

(*y*) Ridout v. Pain, 3 Atk. 494; Richardson v. Nourse, 3 Barn. & Ald. 237.*

(*z*) Re Badger, 2 Barn. & Ald. 691; Young v. Walker, 9 Ves. 364.

(*a*) Nichols v. Roe, 3 Myl. & Keen, 431.

(*b*) Ridout v. Pain, 3 Atk. 494.

of Will. III. (*e*), the court of which it is made a rule has power to set aside the award, not only on the grounds of corruption or undue practice mentioned in the act, but also for mistakes in point of law (*d*); and no other court has a right to entertain any application for this purpose (*e*). The application to set aside the award must, however, be made within the time limited by the act (*f*). But although the time limited by that statute may have expired, yet, if there be any defect apparent on the face of the award, the court will not assist in carrying it into effect by granting an attachment for its nonperformance (*g*). If the submission to arbitration be made by rule or order of the court in any cause independently of the statute, the court still retains its ancient jurisdiction of setting aside the award on account either of the misconduct of the arbitrators, or of their mistake in point of law (*h*). In analogy, however, to the practice under the statute of Will. III., the court in ordinary cases requires application for setting aside the award to be made within the time limited by that statute (*i*); but upon sufficient grounds it will *grant such an application, though [*153] made after the expiration of that time (*j*). Sometimes power is reserved to the court to refer the matter back to the arbitrators for further examination, in the event of any application being made to the court on the subject of the award. In this case the application must be made within the same time as an application to set aside the award (*k*).

If an umpire be appointed, his authority to make an award commences from the time of the disagreement of the arbitrators (*l*), unless some other period be expressly fixed; and if, after the disagreement of the arbitrators, he make an award before the expiration of the time given to the arbitrators to make their award, such award will never-

(*c*) Stat. 9 & 10 Will. III. c. 15,

(*d*) *Zachary v. Shepherd*, 2 T. Rep. 781; *Lowndes v. Lowndes*, 1 East, 276, overruling *Anderson v. Coxeter*, 1 Str. 301; see 1 Wms. Saund. 327 d, n. (*s*).

(*e*) Stat. 9 & 10 Will. III. c. 15, s. 2; *Nichols v. Roe*, 3 Myl. & Keen, 431.

(*f*) *Lowndes v. Lowndes*, 1 East, 276; ante, p. 146.

(*g*) *Pedley v. Goddard*, 7 T. Rep. 73.

(*h*) *Lucas v. Wilson*, 2 Burr. 701.

(*i*) *Macarthur v. Campbell*, 5 Barn. & Adol. 518.*

(*j*) *Rawsthorn v. Arnold*, 6 Barn. & Cress. 629; * S. C. 9 Dow. & Ry. 556.

(*k*) *Doe d. Banks v. Holmes*, 12 Q. B. 951; * *Londonderry and Enniskillen Railway v. Leishman*, 12 Q. B. 423, 431.*

(*l*) *Smailes v. Wright*, 3 Mau. & Sel. 559; *Sprigens v. Nash*, 5 Mau. & Sel. 193.

theless be valid (*m*). The umpire must be chosen by the arbitrators in the exercise of their judgment, and must not be determined by lot (*n*), unless all the parties to the reference consent to his appointment by such means (*o*). In order to enable him to form a proper decision, he ought to hear the whole evidence over again (*p*), unless the parties should be satisfied with his deciding on the statement of the arbitrators (*q*). And the whole matter in difference must be submitted to his decision, and not some particular points only on which the arbitrators may disagree (*r*).

[*154] An award for the payment of money creates a debt *from one party to the other, for which an action may be brought in any court of law (*s*), and which will be sufficient to support a petition for adjudication of bankruptcy (*t*). But when the award is made a rule of court, its performance may, as we have seen (*u*), be enforced by attachment. And where the reference is made by order of the Court of Chancery (*x*), or where the award requires any act to be done which cannot be enforced by an action at law (*y*), equity will decree a specific performance.

The award of arbitrators or of an umpire, though indented and under hand and seal, is not a deed unless delivered as such (*z*). It is however now subject to the same stamp duty as an ordinary deed (*a*).

(*m*) *Sprigens v. Nash*, ubi supra.

(*n*) *In re Cassell*, 9 Barn. & Cress. 624; * *Ford v. Jones*, 3 Barn. & Adol. 248.*

(*o*) *Re Jamieson*, 4 Adol. & Ell. 945.*

(*p*) *Re Salkeld*, 12 Ad. & Ell. 767; * *Re Hawley*, 2 De Gex & Smale, 33.

(*q*) *Hall v. Lawrence*, 4 T. Rep. 589.

(*r*) *Tollit v. Saunders*, 9 Price, 612.

(*s*) 2 Wms. Saund. 62 a, n. (5).

(*t*) *Ex parte Lingard*, 1 Atk. 241.

(*u*) *Ante*, p. 146.

(*x*) *Marquis of Ormond v. Kynnersley*, 2 Sim. & Stu. 15; *Wood v. Taunton*, 11 Beav. 449.

(*y*) *Hall v. Hardy*, 3 P. Wms. 190.

(*z*) *Brown v. Vowser*, 4 East, 584.

(*a*) Stat. 55 Geo. III. c. 184, schedule, part 1, tit. Award.

*PART III.

[*155]

OF INCORPOREAL PERSONAL PROPERTY.

CHAPTER I.

OF PERSONAL ANNUITIES, STOCKS AND SHARES.

IN addition to goods and chattels in possession, which have always been personal property, and to debts which have long since been considered so, there exist in modern times several species of incorporeal personal property to which we now propose to direct our attention. These species of property are certainly not *choses in possession*, neither yet are they like debts strictly *choses in action*, though often classed as such. In analogy, therefore, to the well-known division of real estate into corporeal and incorporeal, we have ventured to place these kinds of property together into a class to be denominated *incorporeal personal property*. A debt no doubt is also incorporeal, but it is still well characterized by its ancient name of a *chose in action*.

The first kind of incorporeal personal property which we shall mention is a *personal annuity* (1). This kind of property is not indeed of so modern an origin as some of those which we shall hereafter mention. It consists of an annual payment, not charged on real estate; but it may nevertheless be limited to the heirs, or the heirs of the body of the grantee. In former times it was doubted whether an annuity was not a mere *chose in action*, and therefore incapable of assignment (*a*); *but this objection has long been overruled. [*156] When limited to the heirs of the grantee it will, on his intestacy, descend, like real estate, to his heir; but it is still personal property (*b*), and will pass by his will under a bequest of all his per-

(*a*) Co. Litt. 144 b, n. (1).

(*b*) Earl of Stafford v. Buckley, 2 Ves. sen. 171; Radburn v. Jervis, 3 Beav. 450, 461.

(1) As a part of the law of this country, this subject has become of far more practical importance than formerly, from the gradual development of the legal principles relating to life insurance, which embrace most, if not all, of those applicable to personal annuities.

sonal estate (*c*). When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail; for this kind of inheritance is not a *tenement* within the meaning of the statute *De donis conditionalibus* (*d*). The grantee has merely a fee simple *conditional* on his having issue, such as a grantee of lands would have had under a similar grant prior to the statute *De donis* (*e*), or as a copyholder would now take in manors where there is no custom to entail (*f*). When the grantee has issue, he may therefore alien the annuity in fee simple by a mere assignment; but should he die without issue, the annuity will fail. A personal annuity given to a man *for ever* will devolve on the executor, and not on the heir of the grantee (*g*).

The next kind of incorporeal personal property to be considered is stock in the public funds, or bank annuities. Previously to the Revolution in 1688 there was no funded debt properly so called; although King Charles I. and King Charles II. both found occasion to raise money by the grant of annuities in fee simple chargeable on particular branches of the revenue. These annuities, not being payable out of real estate, appear to have been the first instances of personal annuities limited to the grantees and their heirs, and they gave [*157] occasion to those law suits by which the legal nature and incidents of personal annuities have been determined; although some mention of such annuities is certainly to be found in the old books (*h*). Soon after the Revolution, however, a portion of the public debt was funded, or transferred into perpetual annuities, payable, by way of interest, on the capital advanced, which capital was to be repaid by the government in the manner agreed on. And from that time to the present, the funded debt of the country has, by several acts of parliament, been greatly increased. Stock in the funds, therefore, is merely a right to receive certain annuities, by half-yearly dividends, as they become due (*i*), subject to the right of government to redeem such annuities on payment of a stipulated sum, which sum is the nominal value of the stock. Thus, 100*l.* 3*l.* per cent. Consolidated Bank Annuities is a right to receive 3*l.* per annum for ever, subject to the

(*c*) *Aubin v. Daly*, 4 Barn. & Ald. 59.*

(*d*) *Turner v. Turner*, 2 Amb. 776, 782; *Earl of Stafford v. Buckley*, *ubi supra*.

(*e*) See *Principles of the Law of Real Property*, 30, 36, 2d ed.; 32, 38, 3d ed.

(*f*) *Ibid.* 286, 2d ed.; 295, 3d ed.

(*g*) *Taylor v. Martindale*, 12 Sim. 158.

(*h*) *Co. Litt.* 144 b; *Fitz. N. B.* 152 a.

(*i*) *Wildman v. Wildman*, 7 Ves. 174, 177; *Rawlings v. Jennings*, 13 Ves. 38, 45.

right of government to redeem this annuity on payment of 100*l.* sterling. The actual value of 100*l.* 3*l.* per cent. Consolidated Bank Annuities (or *Consols* as they are shortly termed) of course depends on the state of the stock market, being generally lower, though it has lately been higher, than the nominal price, which is called *par*.

The public funds are composed of several separate stocks, of which, however, by far the largest and most important are the consols. In this fund the Court of Chancery invests all the money committed to its care belonging to the suitors in that court; and, as it is a rule of equity, that whatever the court would certainly order to be done, may be done without applying to the court, every trustee and executor is justified in investing in consols any money which he may hold in trust, without* any express direction for that purpose (*j*). But [*158] should he invest trust money upon any other security, without express authority so to do, he will be answerable to his cestui que trust for the amount of the money so invested, should the security fail; and it seems also, that the cestui que trust has an option either to claim the money, or to have so much stock as the money improperly invested would have purchased at the time when the improper investment was made (*k*). But when the trustee is authorized by the terms of his trust to invest either in the funds or on real securities, it is now decided, after much conflict of opinion, that the cestui que trust has no option to charge the defaulting trustee with any larger sum than the amount of the money lost, with interest at four per cent. For had the trustee chosen, as he might, to invest on real security, the cestui que trust would have gained nothing by the subsequent rise in the funds (*l*).

The legal nature and incidents of stocks in the public funds have been fixed by the various acts of parliament by which these funds have been created. These statutes are far too numerous to be here mentioned; but their provisions are generally similar. By one of the earliest of these statutes (*m*), it is provided, that all persons who shall

(*j*) *Howe v. Lord Dartmouth*, 7 Ves. 150; *Holland v. Hughes*, 16 Ves. 114; *Tebbs v. Carpenter*, 1 Mad. 306; *Norbury v. Norbury*, 4 Mad. 191.

(*k*) *Forrest v. Elwes*, 4 Ves. 497; *Pride v. Fooks*, 2 Beav. 430; *Robinson v. Robinson*, Lords Justices, 1 De Gex, Mac. & Gord. 247.

(*l*) *Robinson v. Robinson*, ubi supra, overruling *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379, and *Ouseley v. Anstruther*, 10 Beav. 456.

(*m*) Stat. 1 Geo. I. st. 2, c. 19, s. 9.

be entitled to any of the annuities thereby created, and all persons lawfully claiming under them, shall be possessed thereof *as of a personal estate, and the same shall not be descendible to the heir*. And the same rule holds with respect to all the public funds which now exist.

[*159] *The transfer of stock in the public funds is effected only by the signature of the books at the Bank of England in the manner prescribed by act of parliament; and this transfer may be effected either in person or by attorney duly appointed for the purpose by writing, under hand and seal, attested by two or more credible witnesses (*n*). The legal title to stock belongs to the person in whose name it is standing in the bank books; and the bank refuses to recognize trusts, or to keep more than one account for the same person; neither will it allow of the transfer of any stock into the names of more than four persons. When stock is standing in the name of a trustee, the beneficial owner may transfer his equitable interest in any manner he pleases. As the claim of the beneficial owner is equitable only, there will be no occasion to give to the transferee a power of attorney to sue in the name of the transferor (*o*); and the transferee, on giving notice of the transfer to the trustee, will be entitled to a legal transfer of the stock into his own name in the books at the Bank.

As the constant fluctuations of the value of the funds were long since found to present a great temptation to gambling on the chance of their rise or fall, an act was passed in the reign of George II. (*p*) for the purpose of suppressing such transactions. This act was introduced into parliament by Sir John Barnard, whose name it bears; and it is intituled "An Act to prevent the infamous Practice of Stockjobbing." (1) It contains several provisions directed against the

(*n*) Stat. 1 Geo. I. st. 2, c. 19, s. 11, and subsequent acts.

(*o*) See ante, p. 6.

(*p*) Stat. 7 Geo. II. c. 8.

(1) A provision similar to that referred to in the text, exists in the N. Y. Revised Stats., 3d ed., vol. 1, p. 892, whereby it is declared, that all contracts, written or verbal, for the sale or transfer of stocks are void, unless the party contracting to sell be at the time in the actual possession of the evidence of the debt or interest, or otherwise entitled in his own right, or has due authority to sell the same. Under this statute it has been held, that where at the time of the purchase of stock, the persons with whom the contract was

practice of fictitious sales of stock for a future time, where the seller has not the stock he sells, neither intends to procure it, and the buyer has no intention to purchase the amount he contracts for; but the only object of the parties is that, should the stock rise, the vendor should pay the buyer the difference* occasioned by the increase [*160] in price, and, should it fall, the buyer should pay the vendor the difference occasioned by the decrease (*q*). But when an actual sale is in the contemplation of the parties, it is no objection that the vendor is not at the time of the contract actually possessed of the stock he agrees to sell (*r*). It seems that stock is not *goods, wares* or *merchandize* within the 17th section of the Statute of Frauds (*s*), so that it does not require a written memorandum for a contract for its sale, if the value exceeds ten pounds and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part payment (*t*).

(*q*) See *Child v. Morley*, 8 T. Rep. 610; *Hecksher v. Gregory*, 4 East, 607, 614. The buyer who is interested in the rise of the funds is called, in the language of the Stock Exchange, a *bull*, the seller is a *bear*, but either party, if unable to pay his differences, becomes a *lame duck*. A stockjobber, properly so called, is a person who supplies the public, through the medium of the brokers, with money or stock to the exact amount they may require, making a profit of only one eighth per cent. on each transaction; a course of business altogether different from the "infamous" practices usually called stockjobbing by the public.

(*r*) *M'Callan v. Mortimer*, 9 Mee. & Wels. 636.*

(*s*) Stat. 29 Car. II. c. 3. See ante, p. 37.

(*t*) See *Nunes v. Scipio*, 1 Com. 356; *Pickering v. Appleby*, 1 Com. 354; 2 P. Wms. 308; *Pawle v. Gunn*, 4 Bing. N. C. 445; * *Humble v. Mitchell*, 11 A. & E. 205; * *Knight v. Barber*, 16 M. & W. 66.*

made had no stock standing in their names upon the books of the corporation that had issued the stock, and there was no other evidence to prove that they were the owners of the stock contracted to be sold, the would-be purchasers could not maintain an action against them, the transaction being void; *Ward v. Van Duser*, 2 Hall's R. 162. And see also, *Gram v. Stebbins et al.*, 6 Paige's Ch. R. 124.

In Massachusetts, upon an interpretation of a similar statute, it has been decided, that although a person contracting for the sale and transfer of stock, be in possession of the certificate or other evidence of the title to such stock, as required by statute, at the time of the contract, yet if he is nevertheless

then already under a liability or obligation for the sale and transfer of an equal or greater number of shares of the same stock, the contract is absolutely void; *Stebbins et al. v. Leowolf*, 3 Cush. R. 137; but, that a contract for the sale of railroad stock by one who has previously pledged it, and of which the pawnee holds the certificate, but which the pawnor is authorized by the pawnee to sell whenever he has an opportunity, is not within the New York statute concerning stockjobbing; *Thompson v. Alger*, 12 Metc. R. 428.

For the Pennsylvania statute on the subject of stockjobbing, see *Purd. Dig.* (1853,) p. 105, sect. 7.

By a modern act of parliament, the Court of Chancery is empowered to order the dividends of stock belonging to infants to be applied for their maintenance (*u*). By the same act the Lord Chancellor is also empowered to appoint a person to transfer stock and receive and pay over dividends standing in the name of or vested in any lunatic, idiot or person of unsound mind beneficially entitled thereto, or standing in the name of or vested in *the committee of a lunatic who [*161] may have died intestate, or himself become lunatic, or may be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or if it be uncertain whether such committee be living or dead, or if he should neglect or refuse to transfer such stock and to receive and pay over the dividends thereof (*x*). And the Lord Chancellor is also empowered to appoint a person to transfer stock standing in the name of or vested in any lunatic residing out of England; and also to receive and pay over the dividends thereof to the curator of such lunatic or otherwise as the Lord Chancellor shall think fit (*y*). By another recent act it is provided that when stock shall be standing in the name of any infant or person of unsound mind jointly with any person not under any legal disability, such person may alone give a power of attorney to receive the dividends (*z*); and by a more recent act the land or stock of any lunatic, in reversion or expectancy, may be sold or mortgaged for the payment of his debts, or for his maintenance and otherwise for his benefit (*a*).

When any person has an interest in stock standing in the name of another, he is enabled to restrain the transfer of such stock, or, as it is said, to *put a stop upon it*, by means of a writ of *distringas*, to be served upon the Bank of England. This writ appears to be in strictness a proceeding in a suit supposed to have been commenced by the party obtaining it against the Bank and the legal owner of the stock; but in practice a suit is not commenced, unless the right to stop the stock be disputed (*b*). This writ formerly issued only out of the equity side of the Court of Exchequer; but when the equitable jurisdiction of that court was transferred to the Court of Chancery, it was provided [*162] that a writ of *distringas*, in a prescribed form, shall issue out of the latter court, the force and effect of which, and the practice

(*u*) Stat. 11 Geo. IV. & 1 Will. IV. c. 65, s. 32.

(*x*) Sect. 33.

(*y*) Sect. 34.

(*z*) Stat. 8 & 9 Vict. c. 97, s. 3.

(*a*) Stat. 15 & 16 Vict. c. 48.

(*b*) See Wilkinson on the Funds, 235-252.

relating to the same, should be such as was previously in force in the Court of Exchequer (*c*). The writ commands the sheriff to *distrain* the Bank by their lands and chattels, so that they appear in court to answer a bill of complaint lately exhibited against them and other defendants by the person obtaining the writ. The object of the writ is stated in a notice, which is served along with it, to be for the purpose of restraining any transfer of the stock in question until the order of the court be obtained. An appearance is accordingly entered by the Bank, and the transfer of the stock is thus restrained. When the *distringas* is required to be removed, an order of the court may be readily obtained for the dismissal of the supposed suit. It is surprising that a course by which a cestui que trust of stock may be so effectually protected from any fraudulent transfer by his trustee should not be more frequently adopted.

Stock being a kind of *chose in action*, could not formerly have been sold under a *fieri facias* issued in execution of a judgment against the owner (*d*)(1). And, in fact, in the acts by which stocks were created, it was declared that they should not be taken in execution (*e*). But by the act for extending the remedies of creditors against the property of debtors (*f*), it is provided that any judge of one of the superior courts of common law (*g*), on the application of any judgment creditor, may order that any government stock of the debtor standing in his own name, or in the name of any person in trust for him, shall stand charged with the payment *of the judgment debt and interest; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the debtor; but no proceedings are to be taken to have the benefit of such charge until after the expiration of six

(*c*) Stat. 5 Vict. c. 5, s. 5.

(*d*) *Dundas v. Dutens*, 1 Ves. jun. 198.

(*e*) *Bank of England v. Lunn*, 15 Ves. 577.

(*f*) Stat. 1 & 2. Vict. c. 110, s. 14.

(*g*) *Miles v. Presland*, 4 Myl. & Cr. 431.

(1) In Maryland, New Jersey, and Pennsylvania, stock may be taken in execution for the payment of debts; 2 Dorsey's Md. Laws, 1103; Stats. of N. J., pp. 977, 978; Stroud & Brightly's Purd. Dig. pp. 331, 334. In Georgia, no transfer of bank stock can be made by a debtor, after a judgment obtained against him; New Dig. Ls. of Geo. Vol. i. p. 512. In Ohio, the statutes give certain regulations respecting the manner in which a creditor may proceed in chancery against his debtor's equities, stock, &c.; see stats. of Ohio, p. 704.

calendar months from the date of such order (*h*). And by a subsequent act of parliament (*i*), this provision is declared to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in such stock as in the dividends or annual produce thereof, and also to stock in which the debtor may be interested, standing in the name of the accountant general of the Court of Chancery. And in order to prevent any judgment debtor from disposing of the stock authorized to be charged, an order may be procured by the creditor in the first instance *ex parte*, restraining the Bank of England from permitting a transfer of the stock, until the order shall either be made absolute (that is confirmed and continued) or discharged; and no disposition of the judgment debtor in the mean time is to be valid or effectual as against the creditor. And the order will be made absolute if the debtor do not, within a time mentioned in the order, show cause to the contrary (*k*). When the debtor is entitled to the dividends of stock standing in the names of trustees, the order obtained by the creditor charging such dividends will be binding on the trustees; but the Bank must still pay the dividends to the trustees as legal owners (*l*).

The history of the law respecting the transmission of stock by will [*164] affords a curious instance of the *enactments of the legislature having been virtually overruled by the decisions of the Court of Chancery. The acts by which the funds were created, provided that any person possessed of stock might devise the same by will in writing *attested by two or more credible witnesses*; but that such devisee should receive no payment till so much of the will as related to the stock had been entered in the office at the Bank; and in default of such devise the stock should go to the executors or administrators (*m*). The Court of Chancery however held, that as stock had been declared by parliament to be personal estate, it must, like all other personal estate, devolve, in the first instance, on the executor for payment of debts, even though it should have been specially bequeathed (*n*); and that the executor, having it in his hands by virtue

(*h*) See *Watts v. Jefferyes*, 3 Mac. & Gord. 372.

(*i*) Stat. 3 & 4 Vict. c. 82, s. 1. See *Hulkes v. Day*, 10 Sim. 41.

(*k*) Stat. 1 & 2 Vict. c. 110, s. 15.

(*l*) *Churchill v. Bank of England*, 11 Mee. & Wels. 323; * *Bristead v. Wilkins*, 3 Hare, 235.

(*m*) Stat. 1 Geo. I. stat. 2, c. 19, s. 12, and subsequent acts.

(*n*) *Bank of England v. Moffatt*, 3 Bro. C. C. 260; *Bank of England v. Parsons*, 5 Ves. 665; *Bank of England v. Lunn*, 15 Ves. 569.

of his office of executor, was bound after payment of debts to dispose of it according to the will of his testator, even although such will were unattested (*o*). For, previously to the act for the amendment of the laws with respect to wills (*p*), a will of personal estate required no attestation. In effect, therefore, a person was enabled to bequeath his stock by a will unattested. All wills, however, are now required to be attested by two witnesses. And by a recent act of parliament the provisions of the old acts, which had virtually been disregarded, have been formally repealed; and it is declared that the stock of a deceased person may be transferred by his executors or administrators, notwithstanding any specific bequest or disposition thereof contained in the will; but the bank are not to be *required to allow of [*165] such transfer, or of the receipt of any dividend on the stock, until the probate of the will or the letters of administration shall have been first left at the Bank for registration (1). And the Bank may require all the executors who shall have proved the will to concur in the transfer (*q*). And the registry of specific bequests of stock is no

(*o*) *Ripley v. Waterworth*, 7 Ves. 440; *Franklin v. Bank of England*, 575, 589.

(*p*) Stat. 7 Will. IV. & 1 Vict. c. 26.

(*q*) Stat. 8 & 9 Vict. c. 97, s. 1.

(1) The assent of the executor must be obtained before a legatee can take possession of his legacy; *McClanahan's adm'r v. Davis et al.*, 8 How. R. 170; *Rea v. Rhodes*, 5 Ired. Eq. R. 148; *Nunn v. Owens*, 2 Strobbh. R. 101; *Hudson, exec'r v. Reeve*, 1 Barb. Supre. C. R. 89; in which last case it was held, that where the executrix and legatee are the same person, the executrix, as such, might assent to the legacy to herself, and that assent would vest the title in her; and this is true also of specific legacies; *West v. Smith et al.*, 8 How. R. 411; *Lark et al. v. Linstead et al.*, 2 Md. Ch. Decis. 162; *Christ v. Christ, adm'r*, 1 Cart. Inda. R. 570; *Finch v. Rogers*, 11 Hump. R. 559. But the consent of the executor may be implied from the nature of the circumstances, thus, in *Squires et ux. v. Old*, 7 Hump. R. 454, where a legatee had held possession of a slave for seven or eight years, with the knowledge of the executor, it was held, that his assent might be implied. And see

also, *Rea v. Rhodes*, 5 Ired. Eq. R. 148; *White v. White*, 4 Dev. R. 257.

In the case of *Norman et ux. v. Storer et al.*, 1 Blatch. C. C. R. 593, where \$1000 was given to a legatee by will, the money was to be raised out of the testator's estate and paid over to the legatee, and the executor and trustee under the will, having raised the money, instead of paying it as required, purchased bank stock with it, in his own name in trust for the legatee; and afterwards, when called upon to account, sold the bank stock, and paid over the proceeds, \$1,460 34 to the duly authorized agent of the beneficiary which he received as and for the \$1000 legacy, the stock having been sold with his knowledge and assent; it was held, that as there was no evidence that the legatee was advised of the purchase of the bank stock, or ever assented to it, the executor had a right to sell the stock and pay over the proceeds, for the stock did not belong to the legatee, and the executor was guilty of no conversion or wrong in selling it.

longer required, but merely the registry of the names of the deceased party, and of his executors and administrators (*r*).

The next kind of incorporeal personal property which we shall mention are shares in joint stock companies. Joint stock companies were formerly of two kinds, those which were incorporate, or made into *corporations*, and those which were not so.

Corporations are legal personages, always known by the same name, and preserving their identity through a perpetual succession of natural persons. They are either corporations *sole*, composed only of one person, such as a bishop, a parson, or the chamberlain of London; or corporations *aggregate*, composed of many persons acting on all solemn occasions by the medium of their *common seal* (*s*); and it is of such corporations that we are now about to speak. Such corporations may be created either by charter conferred by the queen's letters-patent, or by act of parliament (1). And till recently, all joint stock companies which had not obtained this expensive sanction were in fact private partnerships on an extended scale. Recently, however, as we shall hereafter see, provision has been made for the incorporation of all public joint stock companies (*t*); but such companies as are incor-
 [*166] porated by letters-patent or special *act of parliament still enjoy peculiar privileges. These companies therefore first require notice.

The nature and incidents of shares in the joint stock of companies incorporated by letters-patent or act of parliament, have generally been determined by their respective charters or acts of incorporation.

(*r*) Sect. 2.

(*s*) See Bac. Abr. tit. Corporations; 1 Black. Com. ch. 18.

(*t*) Stat. 7 & 8 Vict. c. 110; 7 & 8 Vict. c. 113.

(1) In the United States, corporations formalities. Special acts of incorporation, are created in all cases, under the authority whether of Congress or of Assembly, either of Acts of Congress, or of Acts of Assembly. themselves create the corporations, or authorize the executive, on the compliance These may be general or special acts. The former confer authority on courts to grant with certain stipulated conditions by the charters in designated cases, or allow in- persons who desire to be incorporated, to dividuals when associated together, to in- issue to such persons letters patent of in- corporate themselves by pursuing certain corporation.

And in the great majority of cases, and in all the modern charters and acts of incorporation, the shares are declared to be personal estate, and transmissible as such. In a few of the older companies, of which the New River Company is an instance (*u*), the shares are real estate in the nature of incorporeal hereditaments. For the future, however, all the provisions contained in special acts for the incorporation of joint stock companies will, as far as possible, be the same. For an act of parliament has recently been passed "for consolidating in one act certain provisions usually inserted in acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature (*x*)(1)." Other acts have also been passed for consolidating certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature (*y*); in acts authorizing the making of railways (*z*); in acts for constructing or regulating markets and fairs (*a*); in acts authorizing the making of gasworks for supplying towns with gas (*b*), or of waterworks for supplying towns with water (*c*); in acts for the making and improving of harbours, docks and piers (*d*); in acts for paving, draining, cleansing, lighting, and improving towns (*e*); and in acts authorizing the making of cemeteries (*f*). In *each of these acts, enactments are made with respect to various matters usually contained in acts of incor- [*167] poration for the above purposes; and it is provided that the clauses and provisions of these general acts, save so far as they shall be expressly varied or excepted by any special act, shall apply to every undertaking which shall thereafter be authorized by act of parliament for any of the purposes above referred to. A uniformity is thus given to the constitution of such companies, and the length of the acts of parliament required to establish them has been greatly diminished.

(*u*) *Drybutter v. Bartholomew*, 2 P Wms. 127.

(*x*) Stat. 8 & 9 Vict. c. 16.

(*y*) Stat. 8 & 9 Vict. c. 18.

(*z*) Stat. 8 & 9 Vict. c. 20.

(*a*) Stat. 10 & 11 Vict. c. 14.

(*b*) Stat. 10 & 11 Vict. c. 15.

(*c*) Stat. 10 & 11 Vict. c. 17.

(*d*) Stat. 10 & 11 Vict. c. 27.

(*e*) Stat. 10 & 11 Vict. c. 34.

(*f*) Stat. 10 & 11 Vict. c. 65.

(1) The respective codes of several of Revis. Stats. of Vt., (1839,) 378 to 394; the States contain general provisions relative to all corporations; *Thomps. Dig. of the Ls. of Florida*, 268 to 284; *Revis. Stats. of Mass.* 362 to 366; *Michi. Revis. Stats.* 223 to 232; *N. H. Compiled Stats.* (1853,) 310 to 374; *Stats. of N. J.*, 125 to 160; *Revis. Stats. of N. Y.* (3d edit.) 710 to 774; *Code of Va.*, (1849,) 291 to 325. And statutes analogous to the 8 & 9 Vict. c. 16, s. 4, &c., are not unusual in this country; *New Dig. Ls. of Georgia*, (1851,) by T. R. Cobb, Vol. 6, 431 to 434; *Stats. of S. C.* Vol. 6, 302 to 306; *Purd. Dig.* (Stroud & Brightly,) 811 to 817.

A short title, for the convenience of reference, is given to each act. The act first mentioned is called "The Companies' Clauses Consolidation Act, 1845 (*g*)," and all the others have similar titles.

The Companies' Clauses Consolidation Act (1), contains provisions with respect to the distribution of the capital of the company into shares, which are to be personal estate, and transmissible as such (*h*); with respect to the transfer of shares, which must be by deed duly stamped, in which the consideration shall be truly stated (*i*), and which cannot take place until the transferor shall have paid all calls for the time being due on every share held by him (*k*); with respect to the transmission of shares by will, intestacy, marriage of a female, &c. (*l*); with respect to the payment of calls (*m*), which may be made payable by instalments (*n*), and the forfeiture of shares for nonpayment of calls (*o*); with respect to the remedies of creditors of the [*168] company *against the shareholders (*p*), which are confined to the extent of their shares in the capital of the company not then paid up, and may be exercised only in case there cannot be found sufficient property or effects of the company whereon to levy execution (*q*); with respect to the borrowing of money by the company (*r*), the conversion of the borrowed money into capital (*s*), the consolida-

(*g*) Stat. 8 & 9 Vict. c. 16, s. 4.

(*h*) Sect. 7.

(*i*) Sect. 14.

(*k*) Sect. 16; Hall v. Norfolk Estuary Company, Q. B., 16 Jur. 149; * Regina v. Londonderry and Coleraine Railway Company, 13 Q. B. 998.*

(*l*) Sects. 18, 19.

(*m*) Sects. 21-28.

(*n*) Ambergate, &c., Railway Company v. Norcliffe, 6 Ex. Rep. 629.*

(*o*) Sects. 29-35.

(*p*) Sect. 36.

(*q*) Devereux v. Kilkenny, &c., Railway Company, 5 Ex. Rep. 834; * Hitchins v. Kilkenny, &c., Railway Company, 10 C. B. 160.*

(*r*) Sects. 38-55.

(*s*) Sects. 56-60.

(1) In the preceding page a reference has been made to several acts analogous to the "Companies' Clauses Consolidation Act," and among other to the Pennsylvania Turnpike Act. Some of these acts are not entirely general, but relate to certain kinds of corporations, as for manufacturing purposes, and the like. The advantage of these enactments is found in the fact, that they form a general law, applicable to all corporations falling under the class to which they relate, and as such are drafted with more care, and more thoroughly considered than private bills of incorporation, whereby many of the dangers resulting from hasty legislation are avoided.

tion of the shares into stock (*t*), general meetings (*u*), the appointment and rotation of directors (*x*), the powers (*y*), proceedings and liabilities of the directors (*z*), the appointment and duties of auditors (*a*), the accountability of the officers of the company (*b*), the keeping of accounts (*c*), the making of dividends (*d*), and of by laws (*e*), the settlement of disputes by arbitration (*f*), the giving of notices (*g*), the recovery of damages and penalties (*h*), and appeals with respect to such damages or penalties to the quarter sessions (*i*); and lastly, with respect to affording access to the special act by all parties interested (*k*). The provisions of the other acts are not of a nature to require enumeration.

Joint stock companies which had not obtained letters-patent or special acts of incorporation were formerly subjected to very great inconvenience whenever they had occasion to take legal proceedings against any person who happened to be a shareholder. And every *shareholder in such companies was subject to the like incon- [*169]venience whenever he had occasion to proceed against the company. For such a company, however extensive, was in law merely a partnership; and a partner who owes money to the partnership, of which he is a member, evidently owes a portion of it to himself, according to his interest in the joint stock; and in like manner, a partner who is a creditor, claims part of his demand against himself. In each case, therefore, an account must be settled before the exact debt or credit of the partner can be ascertained (*l*). In order to obviate the difficulties which thus arose, many joint stock companies obtained special acts of parliament, enabling them to sue and be sued in the name of some officer. And an act of parliament (*m*) was passed empowering the crown to grant, by letters-patent, charters to companies for any trading or other purposes whatsoever, which, without incorporating such companies, would empower them to sue and be

(*t*) Sects. 61-64.

(*x*) Sects. 81-89.

(*z*) Sects. 92-100.

(*b*) Sects. 109-114.

(*d*) Sects. 120-123.

(*f*) Sects. 128-134.

(*h*) Sects. 142-158.

(*k*) Sects. 161, 162.

(*l*) See *Richardson v. Bank of England* 4 My. & Cr. 165.

(*m*) Stat. 7 Will. IV. & 1 Vict. c. 73, repealing a former statute for a similar purpose, 4 & 5 Will. IV. c. 94.

(*u*) Sects. 66-80.

(*y*) Sects. 90, 91.

(*a*) Sects. 101-108.

(*c*) Sects. 115-119.

(*e*) Sects. 124-127.

(*g*) Sects. 135-139.

(*i*) Sects. 159, 160.

sued in the name of some officer appointed and registered for the purpose. This act is still in force, and it contains a valuable provision empowering the crown to limit, by the letters-patent, the liability of the individual members of the company for its engagements to a given extent per share (*n*). Banking companies, whose shareholders are generally their customers, were peculiarly subject to the inconvenience above referred to in suing and being sued. Accordingly, by modern statutes (*o*), all such banking companies as consisted of more than six members were allowed to appoint some public officer who must sue and be sued on behalf of the company (*p*). Recently, how
 [*170] ever, *two acts of parliament have been passed, the one incorporating public joint stock companies, the other for providing for the incorporation of joint stock banks. Each of these acts requires some notice.

The first act is intituled "An Act for the Registration, Incorporation and Regulation of Joint Stock Companies (*q*).” This act applies to every joint stock company established for any commercial purpose, or for any purpose of profit (*r*), or for the purpose of insurance, (except banking companies, schools, and scientific and literary institutions, and friendly, loan, and benefit building societies duly certified and enrolled under the statutes in force respecting such societies (*s*); and the term "joint stock company" comprehends every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners; and also every insurance company, whether of lives, ships, or against fire or storm; and every company for granting or purchasing annuities on lives; and every friendly society insuring to an amount exceeding 200*l*. upon one life or for any one person; and also every partnership which at its formation, or by subsequent admission (except any admission subsequent on devolution or other act of law), shall consist of more than twenty-five members. But the act does not apply to companies incorporated by statute or charter, nor to companies authorized to sue and be sued in the name of some officer

(*n*) Sect. 4.

(*o*) Stat. 7 Geo. IV. c. 46, s. 9, et seq.; 1 & 2 Vict. c. 96; extended 3 & 4 Vict. c. 111; made perpetual, 5 & 6 Vict. c. 85.

(*p*) Chapman v. Milvain, 5 Ex Rep. 61; * Steward v. Greaves, 10 M. & Wels. 711.*

(*q*) Stat. 7 & 8 Vict. c. 110, amended by stat. 10 & 11 Vict. c. 78.

(*r*) See The Queen v. Whitmarsh, 15 Q. B. 600.*

(*s*) See post, pp. 175, 176.

or person (t). This act provides for the establishment of a registry office, in which the name and business of every projected company, together with the names, occupations, and places of business and residence of the promoters of the company must be registered before they can proceed to make public, whether by way *of pro- [*171] spectus, handbill, or advertisement, any intention or proposal to form the company (u). Further particulars are also to be registered as they shall be decided on from time to time (x). This registration, however, only enables the company to act provisionally, and it is therefore termed *provisional registration*. And before the company can act otherwise than provisionally, it must obtain a certificate of *complete registration*. This certificate can only be obtained on production of a deed of settlement of the company, according to the form set forth in the act, signed by at least one-fourth in number of the persons who at the date of the deed have become subscribers, and who shall hold at least one-fourth of the maximum number of shares in the capital of the company (y). This deed must be certified by two directors of the company in a given form; and along with it must be produced a complete abstract or index of the deed, together with a copy of it for registration. Provision is also made for the registration, half-yearly, or oftener, of all transfers of shares, and of changes in the names of the shareholders (z), and for an annual return of the name and business of every company (a). On complete registration being certified, the company becomes *incorporated* (b) as from the date of the certificate, by the name of the company as set forth in the deed of settlement, with power to have a common seal, but on which must be inscribed the name of the company, and with other powers necessary to the conduct of their affairs (c), including a power to hold lands on obtaining a license for that purpose from the Board of Trade (d). *Provision is also made for the registry of joint stock companies [*172] then existing, and for the alteration of their deeds of settlement in order to comply with the provisions of the act (e).

(t) Sect. 2.

(u) Sect. 4. See also stat. 10 & 11 Vict. c. 78 s. 7.

(x) Stat. 7 & 8 Vict. c. 110, s. 4; 10 & 11 Vict. c. 78, ss. 4, 5, 6.

(y) Stat. 7 & 8 Vict. c. 110, s. 7.

(z) Sects. 11-13.

(a) Sect. 14.

(b) *Banwen Iron Company v. Barnett*, 8 C. B. 406.*

(c) Sect. 25.

(d) Stat. 10 & 11 Vict. c. 78, ss. 1, 2, 3.

(e) Sects. 58, 59.

The transfer of shares in every registered company is effected by deed in a given form, to be duly stamped, and in which the full amount of the pecuniary consideration for the sale must be truly expressed (*f*). But no sale or mortgage of any share is valid until the company has obtained a certificate of complete registration and the subscriber has been duly registered as a shareholder in the Registry Office (*g*); and no transfer can be made if the transferror shall not then have paid up the full amount due to the company on every share held by him, unless there be a provision to the contrary in the deed of settlement (*h*). Shareholders in these companies are liable to the creditors of the company, if such creditors have used due diligence to obtain satisfaction by execution against the property of the company; but after the expiration of three years next after any person shall have ceased to be a shareholder, his liability ceases (*i*).

The act which provides for the incorporation of banking companies is intituled "An Act to regulate Joint Stock Banks in England (*k*). The incorporation effected under the provisions of this act is by letters-patent, obtained, on petition, from the crown. The petition is referred to the Board of Trade, on whose report a charter is granted to the [*173] company (*l*) for a term* not exceeding twenty years (*m*). A deed of settlement, according to a form approved by the Board of Trade, and containing certain specified provisions, is required to be executed by the holders of at least one-half of the shares, on which not less than ten per cent. shall have been then paid up, and is to be annexed to the petition; and the provisions of this deed are to be set forth in the letters-patent (*n*). The company, moreover, are not to commence business until all the shares shall have been subscribed for, and the deed executed by the holders of all the shares, and until not less than one-half of each share shall have been paid up (*o*). Before the company begin to carry on their business, a memorial, in a prescribed form, must be delivered for registry at the Stamp Office, in which must be set forth the true title or firm of the company, and the

(*f*) Sect. 54.

(*g*) Sect. 26. This does not apply to companies for executing works which cannot be carried into effect without the authority of parliament. *Young v. Smith*, 15 Mee. & Wels. 121.*

(*h*) Sect. 54.

(*i*) Sects. 66-68.

(*l*) Sect. 3.

(*n*) Sect. 4.

(*k*) Stat. 7 & 8 Vict. c. 113.

(*m*) Sect. 6.

(*o*) Sect. 5.

names and places of abode of all the members, as the same appear on the company's books, and the name and place of abode of every director and manager, or other like officer of the company, and the name of every bank established or to be established by the company, and also the name of every town or place where the business of the company shall be carried on. This memorial is to be annually renewed (*p*). And all changes in the proprietary are also to be registered in like manner from time to time as occasion shall require (*q*). Provision is also made for the incorporation of then existing banking companies by letters-patent, to be obtained by petition to the crown, upon compliance with the provisions of the act (*r*). But if such companies should not obtain letters-patent of incorporation, they will retain the same powers and privileges of suing and being sued in the name of a public officer as they before enjoyed (*s*).

*The transfer of shares in incorporated banking companies is effected by deed duly stamped, in which the consideration must [*174] be truly stated (*t*); and no shareholder is entitled to transfer any share until he has paid all calls for the time being due on every share held by him (*u*)(1). Every shareholder is fully liable to the creditors of the company, if execution against the property and effects of the company shall be ineffectual; but this liability ceases after the expiration of three years from the time when any person shall have ceased to be a shareholder, provided that judgment shall not have been previously obtained for any debt to which he was originally liable (*x*).

The main object of these two statutes was evidently to give publicity to the names of the real promoters and shareholders of joint stock companies, so that the public might know with whom they were dealing, and that those who reaped the benefit of such undertaking might also

(*p*) Sect. 16.

(*q*) Sect. 17.

(*r*) Sect. 45.

(*s*) Sect. 47. See ante, p. 169.

(*t*) Sect. 23.

(*u*) Sect. 24.

(*x*) Sects. 7-10. The sense of the printed copy of the 10th section is spoiled by the insertion of a comma after the word "obtained" in the latter part of that section.

(1) Most of the charters of incorporation for banking purposes in the United States, contain a clause enacting, that the shares thereof shall only be transferred on the books of the institution. This is, in general, effected by a brief letter of attorney, signed by the owner of the stock in the presence of a witness, and directed to an officer of the bank, or in blank, authorizing him to transfer to the vendee.

bear their proper share of the risk. Another object was to recognize, as legal personages, bodies which before had a legal existence, but had no convenient means of acting or of being acted on. In the same spirit another act of parliament was passed in the same session, "for facilitating the winding-up the affairs of joint stock companies unable to meet their pecuniary engagements (*y*)."¹ By this act all incorporated or privileged companies for any commercial or trading purposes, including banking companies (*z*), and also all joint stock companies within the definition contained in the act for their incorporation (*a*), [*175] are made liable to bankruptcy in the same manner as private individuals; but the bankruptcy of the company is not to be construed to be the bankruptcy of any member of the company in his individual capacity (*b*). This act, however, has now been almost entirely superseded by the Joint Stock "Companies Winding-up Act, 1848 (*c*)," as amended by the "Joint Stock Companies Winding-up Amendment Act, 1849 (*d*)," under which an official manager is appointed, and a list of contributories made out, on whom calls are made from time to time for payment of the debts and liabilities of the company. The facilities afforded by these acts to the creditors of joint stock companies, have greatly increased the risk of the holders of shares in those companies, in which the liability of the shareholders is not limited by charter or act of parliament.

Shares in joint stock companies are not *goods, wares or merchandize* within the 17th section of the Statute of Frauds; so that they do not require a written memorandum for a contract for their sale, when the value exceeds 10*l.*, and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part-payment (*e*).

Several acts of parliament have been passed for the encouragement of friendly societies, for the mutual relief of their members and

(*y*) Stat. 7 & 8 Vict. c. 111.

(*z*) Stat. 7 & 8 Vict. c. 113, s. 48.

(*a*) Stat. 7 & 8 Vict. c. 110, s. 2; ante, p. 170.

(*b*) Stat. 7 & 8 Vict. c. 111, s. 2.

(*c*) Stat. 11 & 12 Vict. c. 45.

(*d*) Stat. 12 & 13 Vict. c. 108, and see as to Railways, stat. 13 & 14 Vict. c. 83.

(*e*) *Humble v. Mitchell*, 11 Ad. & Ell. 205; * *Knight v. Barber*, 16 M. & W. 66; * *Bowlby v. Bell*, 3 C. B. 284.* See ante, p. 37.

their families in case of sickness, old age, death or other contingences (*f*); all of which are now consolidated into one act (*g*). The rules *of these societies are required to be certified by the registrar of friendly societies (*h*), and in whose custody a [*176] transcript of the rules of every friendly society is now required to be kept (*i*). And it is now provided that the registrar of friendly societies shall not grant any certificate to any society assuring to any member thereof a certain annuity, deferred or immediate, unless the table of contributions payable for such kind of assurance shall either have been furnished by the registrar, or certified to be a table which may be safely and fairly adopted for such purpose under the hand of the actuary to the commissioners for the reduction of the national debt, or of some person who shall have been for more than five years an actuary to some life assurance company in London, Edinburg, or Dublin (*k*). On the death or removal of any trustee of one of these societies, the whole property of the society vests in the succeeding trustee for the same estate and interest as the former trustee had therein, and subject to the same trusts, without any assignment or conveyance whatever, except the transfer of stocks and securities in the public funds (*l*). And on the death, bankruptcy or insolvency of any officer of any such society, or on any execution issuing against him, or on his making any assignment or conveyance for the benefit of his creditors, the money or effects in his hands belonging to the society are to be paid over and delivered to the society before any other of his debts are paid (*m*). An act of parliament has also been passed to legalize the formation of industrial and provident societies for carrying on trades or handicrafts *in common (*n*). Loan societies are regulated by another act [*177] of parliament, which is annually continued (*o*).

An act of parliament has also been passed for the regulation of

(*f*) Stat. 10 Geo. IV. c. 56, amended 4 & 5 Will. IV. c. 40; 3 & 4 Vict. c. 73; 9 & 10 Vict. c. 27.

(*g*) Stat. 13 & 14 Vict. c. 115, amended and continued by stat. 15 & 16 Vict. c. 65.

(*h*) Stat. 13 & 14 Vict. c. 115, s. 6.

(*i*) Sect. 7. A transcript of the rules was formerly required to be enrolled with the clerk of the peace. Stat. 4 & 5 Will. 4, c. 40, s. 4.

(*k*) Stat. 13 & 14 Vict. c. 115, s. 8.

(*l*) Sect. 13.

(*m*) Sect. 36.

(*n*) Stat. 15 & 16 Vict. c. 31.

(*o*) Stat. 3 & 4 Vict. c. 110, last continued by stat. 15 & 16 Vict. c. 15.

benefit building societies (*p*)(1). The funds of these societies are raised by monthly subscriptions of the members, which must not exceed 20s. per share, and by fines for non-payment. The shares must not exceed the value of 150*l.* each; but any member may hold more than one share (*q*). When the amount of the shares has been realized, the money is divided amongst the members, and the society is dissolved. Such members, however, as may wish to buy land or to build, may receive the amount of their shares in advance on payment of an additional subscription by way of interest, and also on payment of a bonus for the advance, which of course is deducted from the amount of the share advanced. This bonus is usually determined by competition amongst the members, the shares to be paid in advance being put up by auction by the society; and the subscriptions and fines to become due in respect of the advanced shares are then secured to the society by the purchasers, by mortgage of land or houses of sufficient value (*r*). These mortgages are not liable to stamp duty (*s*); they are also exempt from any of the forfeitures or penalties of usury (*t*); and a receipt for the monies secured, indorsed by the trustees of the society upon any such mortgage, vests the estate comprised in the security in the person entitled to the equity of redemption, without any reconveyance (*u*).

[*178] *The provisions above referred to for charging the stock of any debtor with the payment of any judgment debt (*x*), extend

(*p*) Stat. 6 & 7 Will. IV. c. 32.

(*q*) *Morrison v. Glover*, 4 Ex. Rep. 430.*

(*r*) See *Mosley v. Baker*, 6 Hare, 87; *Doe d. Morrison v. Glover*, 15 Q. B. 103.*

(*s*) *Walker v. Giles*, 6 C. B. 662.*

(*t*) Stat. 6 & 7 Will. IV. c. 32, s. 2.

(*u*) Sect. 5.

(*x*) Ante, p. 162.

(1) An act of the legislature of Pennsylvania, passed the 22d day of April, 1850, empowers, "any number of persons, citizens of the city and county of Philadelphia, and the counties of Schuylkill and Berks," "who are associated, or who mean to associate "for the purpose of forming mutual savings fund, land and building associations, to make application for incorporation "to the Court of Common Pleas of the proper county in which said corporation or body politic in law is intended to be situated;" and the said courts are thereby authorized to incorporate the said associations, under the stipulations and provisos therein mentioned. By an act of the 3d of April, 1851, the above provisions are extended to Montgomery county. By the act of the 21st of April, 1852, they are extended to Delaware county; and by the act of 14th of April, 1853, they are extended to Alleghany county. *Purd. Dig.* (Stroud & Brightly,) 166, and note *e*.

to stock and shares in any public company in England, whether incorporated or not (*y*).

The prerogative of the crown in the grant of letters-patent is frequently exercised not only for the incorporation of joint stock companies, but also for conferring on private individuals certain exclusive rights and privileges. These rights, called *patents* from the letters-patent which confer them, will be considered in the next chapter.

*CHAPTER II.

[*179]

OF PATENTS AND COPYRIGHTS.

A PATENT is the name usually given to a grant from the crown, by letters-patent, of the exclusive privilege of making, using, exercising and vending some new invention. The granting of such letters-patent is an ancient prerogative of the crown, a prerogative which remains unaffected by the recent Patent Law Amendment Act, 1852 (*a*). In the reign of Queen Elizabeth, this prerogative was stretched far beyond its due limits, and the monopolies thus created formed one of the grievances which King James, her successor, was at last obliged to remedy. Accordingly by a statute passed in the twenty-first year of his reign, and commonly called the Statute of Monopolies (*b*), it was declared and enacted that all such monopolies were altogether contrary to the laws of this realm, and so were and should be utterly void and of none effect, and in nowise put in use or execution. In this statute, however, there are certain exceptions, and particularly one on which the modern law with respect to patents may be said to be founded. This exception is as follows: "Provided also and be it declared and enacted, that any declaration before-mentioned shall not extend to any letters-patent and grants of privilege for the term of *fourteen years* or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters-patent and *grants shall not use, so also they be not contrary to the law nor mischievous to the

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(*y*) Stat. 1 & 2 Vict. c. 110, s. 14.

(*a*) Stat. 15 & 16 Vict. c. 83; see sect. 16.

(*b*) Stat. 21 Jac. I. c. 3.

state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this act had never been made and of none other (*c*).

It will be seen that the granting of letters-patent is not expressly warranted by this statute; but that it merely reserves to such letters-patent as fall within the terms of the exception, such force as they should have had if the act had never been made, and none other force. As, however, all grants of exclusive privilege by letters-patent, which do not fall within this exception, and some others of little importance, are now rendered void by the statute, the construction of this exception has become a matter of great practical importance. And first, the term must be *fourteen* years from the date of the letters-patent, or under; and the full term of fourteen years is usually granted. But by the Patent Law Amendment Act, 1852, it is now provided, that all letters-patent for inventions, granted under the provisions of that act, shall be made subject to the condition, that the same shall be void, and that the powers and privileges thereby granted shall cease, at the expiration of three and seven years respectively, from the date thereof, unless there be paid before the expiration of three and seven years respectively from the date thereof, unless there be paid before the expiration of the said three and seven years respectively, certain fees and stamp duties mentioned in the act, namely, 40*l.* fee and 10*l.* stamp duty, at or before the expiration of the third year, and 80*l.* fee and 20*l.* stamp duty at or before the expiration of the seventh year (*d*).

[*181] These payments appear high, but they are a great improvement on the old law, under which heavy fees and duty were payable on taking out every patent; whereas now, if a patent prove useless, it may be discontinued, and the payment saved. By a recent act of parliament (*e*), a prolongation of the term granted by the original letters-patent may be granted either to the original grantor or to his assignee (*f*), for a term not exceeding *seven* years after the expiration of the first term, in case the Judicial Committee of the Privy Council

(*c*) Stat. 21 Jac. I. c. 3, s. 6.

(*d*) Stat. 15 & 16 Vict. c. 83, s. 17.

(*e*) Stat. 5 & 6 Will. IV. c. 83, s. 4, amended by 2 & 3 Vict. c. 67; and extended by stat. 15 & 16 Vict. c. 83, s. 40, to letters-patent granted under that act.

(*f*) Russell v. Ledsam, 14 Mee. & Wels. 574; * affirmed 16 M. & W. 633; * 1 H. of L. Cas. 687.

shall, upon proper application, report to her Majesty that such further extension of the term should be granted. And if such further period of seven years can be shown to be insufficient for the reimbursement and remuneration of the expense and labour incurred in perfecting the invention, then, by a subsequent statute (*g*), the crown may grant to the inventor, or his assignee, an extension of the patent for any time not exceeding *fourteen years* (1).

(*g*) Stat. 7 & 8 Vict. c. 69, ss. 2, 4, continued by stat. 15 & 16 Vict. c. 83, s. 40.

(1) The acts of Congress in relation to patents, which had been enacted prior to the 4th of July, 1836, were repealed by the last section of the act approved on that day. This act, and the subsequent enactments on the same subject, constitute the present patent law of the United States. The sixth section of the act of the 4th of July, 1836, (5 Stats. at Large, 117,) points out the manner in which application is to be made for a patent by an inventor or inventors, for "any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use, or on sale, with his consent or allowance, as the inventor or discoverer." By the ninth section of the same act, thirty dollars is to be paid by "a citizen of the United States, or an alien" who "shall have been resident in the United States for one year next preceding, and shall have made oath of his intention to become a citizen thereof," at the time of making application for a patent; but if the inventor is a subject of the King of Great Britain, the sum to be paid is five hundred dollars; and in all other cases three hundred dollars.

By the sixth section of the act of March 3, 1839, (5 Statutes at Large, 353,) it is enacted, that no person shall be debarred from receiving a patent, "by reason of the same having been patented in a foreign country more than six months prior to his application, provided, that the same shall

not have been introduced into public and common use in the United States prior to the application for such patent;" and therein it is also provided, that the term for which the patent shall issue shall not exceed fourteen years from the time when the patent issued in the foreign country.

The third section of the act of August 29, 1842, provides, that citizens or aliens who have resided one year in the United States, and taken oath of their intention to become citizens, may have a patent upon payment of one-half of the fee heretofore required, "who have invented or produced any new and original design for the manufacture, whether of metal or other material or materials, or any new and original design for the printing of woolen, silk, cotton, or other fabrics, or any new and original design for a bust, statue or bas-relief, or composition in alto, or basso relievo, and any new or original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others." The term for which the patent is granted in this case is seven years.

The fifth section of the act of July 4, 1836, authorizes patents to issue for the term of fourteen years; and the eighteenth section of the same act provides, that after the expiration of the said term of fourteen years, the patent may be renewed for the

Secondly, the patent must be for "new manufactures within this realm, which others at the time of making such letters-patent and grants shall not use." The *use* here mentioned has been held to mean a use in public; if therefore the invention, for which the patent is sought to be obtained, has been previously used in public within the realm, the patent will be void (*h*). And the *realm* in this statute has been determined to mean the united kingdom of Great Britain and

(*h*) *Lewis v. Marling*, 10 Barn. & Cres. 22; * *Carpenter v. Smith*, 9 M. & W. 300.*

term of seven years; but the application for renewal must be made before the term of fourteen years is expired.

In the case of *Child v. Adams et al.*, decided in the Circuit Court of the United States, for the Eastern District of Pennsylvania, in November, 1854, and still unreported, in which a question arose relative to a mistake made by an alien in obtaining a patent, who paid only the fees due by a citizen of the United States, under the impression that no more was demandable from him, when in fact he was a citizen of France, and as such should have paid greater sums; GREER, J., uses the following language:—"The original letters patent to J. G. Mini, for his 'improvement in making Lamp-Black,' were issued on the 13th of November, 1844, and recited that Mini '*has made oath that he is a citizen of the United States,*' &c., and '*paid the sum of thirty dollars,*' &c. On this patent the complainant, as assignee of Mini, filed his bill to April term, 1850, against the respondents, alleging an infringement and praying for an injunction. Among other matters of defence pleaded in the respondent's answer, it was averred, that 'J. G. Mini was not entitled to said patent at the time it was granted to him, because he was an alien, being a native of France, and not a naturalized citizen of the United States; and that he had applied for and obtained the said letters patent, as a citizen of the United States, for the purpose of defrauding the revenue of the additional fees and charges, which, as an alien, he should have paid in order to obtain a patent.' "

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"When a statute defines the extent of power given to one who acts ministerially, the court cannot extend it, or validate acts done without or beyond its authority. I would not be considered as imputing any moral guilt to Mr. Mini, or intent to commit perjury in his particular case. It is *possible* that men may live thirty years in this country and not know that in order to become a citizen an alien must be naturalized. It is possible, too, that an alien dragged to the polls '*by respectable gentlemen,*' and permitted to vote by a complaisant inspector, without question, may fancy himself to have been thus transmuted into a citizen. But instances of such amiable ignorance are so rare, that it could hardly be expected that legislatures should anticipate it by providing a remedy for those whose mistakes are the consequence of it. Nor will the hardship of this particular case justify the commissioner of patents in assuming a power not granted to him by the statute. He has no power to confirm a patent obtained by a false suggestion, either by pardoning the offence or excusing it on the plea of innocent ignorance. A mistake or inadvertence in the specification of a patent can be proved by the face of the paper, and the reason alleged for it. But where a person makes a mistake in his oath of citizenship, and enjoys the benefits of it for more than half his term, his innocence can be proved by his own oath alone, and he ought not to be allowed to obtain a new patent for the other half by stultifying himself. This would be holding out a premium for profitable mistakes, and an encouragement to double perjury."

Ireland; so that when separate letters-patent were granted for England and Scotland, if any invention had been publicly known *or practiced in England, a patent for Scotland was void (*i*). [*182] By an act of parliament, to which we have before referred, it is however provided that letters-patent may be confirmed, or new ones granted, for any invention, or supposed invention, which shall have been found by the verdict of a jury, or discovered by the patentee or his assigns, to have been either wholly or in part invented or used before, if the Judicial Committee of the Privy Council, upon examining the matter, shall be satisfied that the patentee believed himself to be the first and original inventor, and that such invention, or part thereof, *had not been publicly and generally used* before the date of the first letters-patent (*k*). It is also now provided by the recent Patent Law Amendment Act, that any invention may be used and published for six months from the date of the application for letters-patent for the invention, without prejudice to the letters-patent, provided the provisional specification, which describes the nature of the invention, and is to accompany the petition for the letters-patent, be allowed by the proper law officer (*l*). It is also provided that the applicant, instead of having a provisional specification, may, if he think fit, file a complete specification under his hand and seal, particularly describing and ascertaining the nature of his invention, and in what manner the same is to be performed, in which case the invention will be protected for six months from the date of the application, and may be used and published without prejudice to any letters-patent to be granted for the same (*m*). It is also provided that if any application for letters-patent be made in fraud of the true and first inventor, any letters-patent granted to the true and first inventor shall not be *invalidated [*183] by reason of any use or publication of the invention subsequent to such application, and before the expiration of the term of protection (*n*).

Thirdly, a patent must be granted “to the true and first inventor and inventors.” If, therefore, the original inventor should sell his secret to another person, such person cannot obtain letters-patent for the invention in his own name; but the original inventor must obtain the letters-patent, and then assign them to the other. If two persons

(*i*) *Brown v. Annandale*, 8 Cl. & Fin. 214.

(*k*) Stat. 5 & 6 Will. IV. c. 83, s. 2.

(*l*) Stat. 15 & 16 Vict. c. 83, s. 8.

(*m*) Sect. 9.

(*n*) Sect. 10.

should both make the same discovery, he who first publishes it by obtaining a patent for it, will be the true and first inventor within the meaning of the statute, although he may not actually have been the first to make the discovery (*o*). But a person cannot obtain a patent for an invention which has been communicated to him by another within the realm (*p*). If, however, a person should be in possession of an invention communicated to him from abroad, such person, if he be the first introducer of the invention into this country, is regarded by the law as the true and first inventor thereof within the meaning of the statute of James (*q*); and it is no objection that the patent is taken out in trust merely for the foreign inventor (*r*). But it is now provided that where letters-patent are granted in the United Kingdom for any invention first invented in any foreign country, or by the subject of any foreign state, and a like privilege for the exclusive use or exercise of such invention in any foreign country is there obtained before the grant of such letters-patent in the United Kingdom, all rights and privileges under such letters-patent shall (notwithstanding any [*184] term in such *letters-patent limited) cease and be void immediately upon the expiration or other determination of the term of the like privilege obtained in such foreign country; or where more than one such like privilege is obtained abroad, immediately upon the expiration or determination of the term of such privileges, which shall first expire or be determined. And no letters-patent granted for any invention for which any patent or like privilege shall have been obtained in any foreign country, shall be of any validity if granted after the expiration of the term for which the foreign patent or privilege was in force (*s*). The remaining restrictions imposed by the act of James I. require no comment.

† The granting of letters-patent, is, as has been observed, a prerogative of the crown; and although a patent may now be always obtained for any new invention, yet the grant is still a matter of favor and not of right, and all grants of letters-patent for inventions are at the present day clogged with certain conditions. Of these conditions, the most important is that which requires the inventor particularly to describe

(*o*) *Boulton v. Bull*, 2 H. Black. 487.

(*p*) *Hill v. Thompson*, 8 Taunt. 395; * S. C. 2 J. B. Moore, 452.

(*q*) *Edgeberry v. Stephens*, 2 Salk. 447.

(*r*) *Beard v. Egerton*, 3 C. B. 97, 129.*

(*s*) Stat. 15 & 16 Vict. c. 83, s. 25.

and ascertain the nature of his invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, called the specification, and to cause the same to be filed in the High Court of Chancery within a given period, generally six calendar months from the date (*t*). This instrument was formerly required to be enrolled instead of being merely filed as at present. And it is provided by the new act that, if a complete specification be filed along with the petition for the letters-patent, then, in lieu of a condition for making void the letters-patent in case the invention be not described and ascertained by a subsequent *specification, the [*185] letters-patent shall be conditioned to become void, if such complete specification filed as aforesaid does not particularly describe and ascertain the nature of the invention, and in what manner the same is to be performed (*u*). The object of requiring a specification is to secure to the public the benefit of the knowledge of the invention after the term granted by the patent shall have expired. The framing of the specification is a matter of great nicety; for the description contained in it must correspond with the title of the invention contained in the letters-patent (*v*), and must clearly describe the invention (*x*), neither covering more than the proper subject of the patent (*y*) nor omitting anything necessary to make the description intelligible (*z*). Provision however has been made by an act of parliament before referred to (*a*), for enabling the grantee or assignee of any letters-patent to enter a *disclaimer* of any part of either the title of the invention, or of the specification, stating the reason of such disclaimer, or to enter a memorandum of any alteration in the title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the patent (1). Under these provisions, letters-

(*t*) Stat. 15 & 16 Vict. c. 83, s. 27.

(*u*) Sect. 9.

(*v*) *Rex v. Wheeler*, 2 Barn. & Ald. 345, 350. See *Nickels v. Haslam*, 7 Man. & Gran. 378; * *Beard v. Egerton*, 3 C. B. 97.*

(*x*) *Bloxham v. Elsee*, 6 Barn. & Cres. 169.*

(*y*) *Hill v. Thompson*, 3 Meriv. 629.

(*z*) *Rex v. Wheeler*, ubi supra; *Neilson v. Harford*, 8 Mee. & Wels. 805.*

(*a*) Stat. 5 & 6 Will. IV. c. 83, s. 1. See also stat. 7 & 8 Vict. c. 69, ss. 5, 6.

(1) A provision entirely similar is contained in the seventh section to the act of Congress of the 3d of March, 1837, which sets forth, that "whenever any patentee shall have, through inadvertence, accident or mistake, made his specification of claim too broad, claiming more than that which he was the original or first inventor,

patent originally void may in many cases be rendered valid from the time of the entry of the disclaimer or alteration (*b*). And these provisions have been extended to letters-patent granted and specifications filed under the Patent Law Amendment Act, 1852 (*c*). This act [*186] also provides for the *printing, publishing, and sale, under the direction of the commissioners of patents, of all specifications, disclaimers, and memoranda of alterations deposited or filed under the act (*d*). A "register of patents" is also directed to be kept, where shall be entered and recorded, in chronological order, all letters-patent granted under the act, the deposit or filing of specifications, disclaimers and memoranda of alterations filed in respect of such letters-patent, all amendments in such letters-patent and specifications, all confirmations and extensions of such letters-patent, the expiry, vacating, or cancelling of such letters-patent, with the dates thereof respectively, and all other matters and things affecting the validity of such letters-patent as the commissioners may direct; and such register, or a copy thereof, is to be open at all convenient times to the inspection of the public, subject to such regulations as the commissioners may make (*e*).

Another condition formerly inserted in letters-patent rendered them void, in case the letters-patent, or the liberty and privileges thereby granted, should become vested in or in trust for more than the number of twelve persons, or their representatives, at any one time, as partners, dividing or entitled to divide the benefit or profit obtained by reason thereof; but it is now enacted that, notwithstanding any proviso that may exist in former letters patent, it shall be lawful for a larger number than twelve persons hereafter to have a legal and beneficial interest in such letters-patent (*f*).

(*b*) *Perry v. Skinner*, 2 M. & W. 471.*

(*c*) Stat. 15 & 16 Vict. c. 83, s. 39.

(*d*) Sect. 29.

(*e*) Sect. 34.

(*f*) Sect. 36.

some material and substantial part of the thing pretended being truly and justly his own, any such patentee * * * may make disclaimer of such parts of the thing patented, as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent * * * And such disclaimer shall thereafter be taken and considered as part of the original specifica-

tion, to the extent of the interest which shall be possessed in the patent, or right secured thereby by the disclaimant."

On the subject of disclaimer, see the following authorities: *O'Reilly et al. v. Morse et al.*, 15 How. R. 63; *Whitney et als. v. Emmett et als.*, 1 Baldw. R. 303; *Wyeth et al. v. Stone et als.*, 1 Story's R. 273; *Reed v. Cutter et als.*, Id. 590.

In letters-patent a clause is usually contained forbidding all persons from using the invention without the consent, license or agreement of the inventor, his *executors, administrators or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf (*g*). The granting of licenses to use a patent is one of the most profitable ways of turning it to account. All licenses are now required to be registered in the registry to be presently mentioned. [*187]

Letters-patent obtained in England formerly conferred an exclusive privilege only within England, Wales, and the town of Berwick upon Tweed; and also within the islands of Guernsey, Jersey, Alderney, Sark and Man, and Her Majesty's colonies and plantations abroad, if so expressed in the patent. In order to obtain the like exclusive privilege for Scotland, it was necessary, to obtain separate letters-patent under the seal appointed by the treaty of union to be used instead of the great seal of Scotland; and in the same manner the like privilege for Ireland was required to be obtained by letters-patent under the great seal for Ireland. But it is now provided that letters-patent shall extend to the whole of the United Kingdom of Great Britain and Ireland, the channel islands, and the Isle of Man; and in case the warrant for granting the patent shall so direct, such letters-patent shall be made applicable to her Majesty's colonies and plantations abroad, or such of them as may be mentioned in such warrant (*h*). But where separate letters patent for England, Scotland or Ireland have been already granted, separate letters-patent may still be granted, for the other countries, on payment for such country of one third the fees and stamps payable for a patent for the whole kingdom (*i*).

Letters-patent and the privileges thereby granted are freely assignable from one person to another, and the *assignee by such assignment is placed in the same position as his assignor previously stood (1). The assignee may consequently bring in his own [*188]

(*g*) See the form of letters-patent in Appendix (A.)

(*h*) Stat. 15 & 16 Vict. c. 83, s. 18.

(*i*) Sect. 53. See ante, p. 180.

(1) See Acts of Congress of, the 4th of July, 1836, sect. 11, and of the 3d of March, 1837, sect. 6. An assignment of a patent right may be made before the issuing of a patent; Gayler et al. v. Wilder, 10 How. R. 477; and the

name the same actions and suits both at law and in equity against those who have infringed upon the patent as the patentee himself might have done (*k*). The privileges granted by letters-patent are therefore plainly an instance of an incorporeal kind of personal property, different in its nature from a mere *chose in action*, which never has been assignable at law. A deed is said to be necessary for the valid legal assignment of letters-patent; but the author is not aware of any authority for this position; and the general rule appears to be, that the assignment of incorporeal personal property may be made without deed. Perhaps, however, the necessity of an assignment by deed may be implied from the clause in the letters-patent, which forbids the use of the invention "without the consent, license or agreement of the inventor, his executors, administrators or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf." All assignments of letters-patent are now required to be registered under the Patent Law Amendment Act, 1852 (1).

The act provides that there shall be kept at the office appointed for filing specifications in chancery under this act, a book or books entitled "The Register of Proprietors," wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters-patent, or of any share or interest therein, any license under

(*k*) Godson on Patents, 237.

assignee, in all cases taking subject to the legal consequences of the previous acts of the assignor, (*McClurg v. Kingsland et al.*, 1 How. R. 202,) may maintain an action in his own name, *Brooks et al. v. Bicknell et al.*, 3 McLean's R. 250. An extension of a patent procured by the executor or administrator of the inventor, does not enure to the benefit of the assignees; *Wilson v. Rousseau et al.*, 4 How. R. 646; but, an assignee who was in the use of the thing patented at the time of the renewal, has still a right to use it; *Wilson v. Rousseau et al.*, 4 How. R. 646; *Wilson v. Simpson et als.*, 9 Id. 109; *Bloomer v. McQuewan*, 14 Id. 539.

A covenant by a patentee, made prior to the law authorizing extensions, that the covenantee should have the benefit of any improvement, or alteration, or renewal of

the patent, does not include the extension obtained by an administrator under the act of 1836, but only the renewal obtained upon a surrender of the patent on account of a defective specification; *Wilson v. Rousseau et al.*, 4 How. R. 646.

When an assignment is made under the act of 1836, of the exclusive right within a specified part of the country, the assignee may sue in his own name, provided the assignment be of the entire and unqualified monopoly; but any assignment short of this is a mere license, and will not carry with it a right to the assignee to sue in his own name; *Gayler et al. v. Wilder*, 10 How. R. 477.

(1) Act of Congress of 4th of July, 1836, sect. 11; *Gayler et al. v. Wilder*, 10 How. R. 477; *Wyeth et al. v. Stone et als.*, 1 Story's R. 273.

letters-patent, and the district to which such license relates, with the name or names of any person having any share or interest in such letters-patent or license, the date of his or their acquiring such letters-patent, share, and interest, and any other matter or thing relating to or *affecting the proprietorship in such letters-patent or license; [*189] and a copy of any entry in such book, certified under such seal as may have been appointed, or as may be directed by the Lord Chancellor, to be used in the said office, shall be given to any person requiring the same, on payment of the fees therein provided; and such copies so certified shall be received in evidence, in all courts and in all proceedings, and shall be *primâ facie* proof of the assignment of such letters-patent, or share or interests therein, or of the license or proprietorship as therein expressed: provided always, that until such entry shall have been made, the grantee or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, and of all the licenses and privileges thereby given and granted (7)(1).

(7) Stat. 15 & 16 Vict. c. 83, s. 35.

(1) The improvements in mechanics consist entirely of new adaptations or combinations of the six primary mechanical powers; but any combination of mere theory, existing only in the brain of the inventor, and not rendered effective practically and materially, although its advantages and its usefulness to the public may be demonstrated with mathematical certainty, cannot be the subject of a patent, being merely an abstract principle; *Odwine v. Winkley*, 2 Gall. R. 51; *Blanchard v. Sprague*, 3 Sumn. R. 535; *Stone v. Sprague et al.*, 1 Story's R. 270. In the case of *Le Roy et al. v. Tatham et al.*, 14 How. R. 156, Justice McLean says, "A principle is not patentable. A principle in the abstract is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right * * * the elements of power existing, the invention is not in discovering them, but in applying them to useful objects." But the original inventor of an abstract principle, who has reduced it to a practical and useful form is entitled to a patent; *Woodcock v. Parker et al.*, 1 Gall. R. 438; *Bedford v. Hunt et al.*, 1 Mas. R. 302; *Le Roy et al. v. Tatham et al.*, 14 How. R. 156; *Washburn et al. v. Gould*, 3 Story's R. 122; *Lowell v. Lewis*, 1 Mas. R. 182; if, however, the thing patented, had been previously known and used, the patent is void; *Bedford v. Hunt et al.*, 1 Mas. R. 302; *Shaw v. Cooper*, 7 Pet. R. 292; *Whitney et als. v. Emmett et als.*, 1 Baldw. R. 303; *Morris v. Huntington*, 1 Paine's C. C. R. 348; *Pennock et al. v. Dialogue*, 2 Pet. R. 1; *Reed v. Cutter et als.*, 1 Story's R. 590; and this is the case even where the inventor was entirely ignorant of such previous use; *Evans v. Eaton*, 3 Wheat. R. 454, S. C. 1 Pet. C. C. R. 322; *Dawson v. Follen*, 2 Wash. C. C. R. 311; *Delano v. Scott*, Gilp. R. 489; so, where an original inventor allows his invention to be used by the public, this is considered as an abandonment of his right, and of course will furnish a good objection to his obtaining a patent; *Gayler et al. v. Wilder*, 10 How. R. 477; *Shaw v. Cooper*, 7 Pet. R. 292; *Whittemore et al. v. Cutter*, 1 Gall. R. 478;

Mellus v. Silsbee, 4 Mas. R. 108; *Pennock et al. v. Dialogue*, 2 Pet. R. 1; but it should be clearly established by proof, that such public use was with the knowledge and consent of the inventor, for the mere user by the inventor of his discovery, in trying experiments, or by his neighbours, with his consent, as an act of kindness for temporary and occasional purposes only, will not destroy the right of the discoverer to a patent; *Wyeth et al. v. Stone et als.*, 1 Story's R. 273; so, too, the inventor will not be deprived of his patent, where the knowledge of the discovery is surreptitiously obtained and communicated to the public; *Shaw v. Cooper*, 7 Pet. R. 292; *Whitney et als. v. Emmett et als.*, 1 Baldw. R. 303; *Ryan et al. v. Goodwin et als.*, 3 Sumn. R. 514; and in like manner, any intermediate knowledge or use between the time of discovery and the application for a patent, by a subsequent inventor, will not deprive the original discoverer of his right to a patent, who is during that time perfecting his invention, or using due diligence to secure his patent; *Whitney et als. v. Emmett et als.*, 1 Baldw. R. 303; *Morris v. Huntington*, 1 Paine's C. C. R. 348; *Reed v. Cutter et als.*, 1 Story's R. 590.

A previous discovery in a foreign country will not render a patent obtained here void, unless such discovery had been patented, or described in a printed publication; *O'Reilly et al. v. Morse et al.*, 15 How. R. 63; *Brooks et al. v. Bicknell et al.*, 3 McLean's R. 250.

If a machine produce several different effects by a particular combination of machinery, and these effects are produced in the same way in another machine, and a new effect added, the inventor of the latter is not entitled to a patent for the whole of the machine, but merely for the improvement; *Whittemore et al. v. Cutter*, 1 Gall. R. 478; *Odwine v. Winkley*, 2 Id. 51; *Barrett et al. v. Hall et al.*, 1 Mas. R. 447; *Goodyear v. Matthews*, Paine's C. C. R. 300; and for each improvement of a machine, there must be a separate patent; *Barrett et al. v. Hall et al.*, 1 Mas. R. 447.

The description contained in the specification must be so clear, that any one skilled in the art to which it appertains, may compound or use the thing patented, without making experiments; *Wood v. Underhill*, 5 How. R. 1; *Gray et al. v. James et als.*, 1 Pet. C. C. R. 394; in the case of *Lowell v. Lewis*, 1 Mas. R. 182, however, it was decided, that if the invention be definitely described in the patent, so as to distinguish it from what is before known, the patent will be good, though the specification does not describe the invention in such full, exact, and clear terms, that a person skilled in the art or science of which it is a branch, could construct or make the thing invented; but the invention must be so clearly described as to enable the public to appropriate it after the expiration of the patent right; *Sullivan v. Redfield et al.*, Paine's C. C. R. 441; *Evans v. Chambers*, 2 Wash. C. C. R. 125; *Ames v. Howard et al.*, 1 Sumn. R. 482.

If a patent has been granted upon a specification defective by reason of its obscurity, the proper course is to surrender the patent, and take out a new one; *Stimpson v. The West Chester R. R. Co.*, 4 How. R. 380; *Wilson v. Rousseau et al.*, Id. 646; *Odwine v. The Amesbury Nail Factory*, 2 Mas. R. 28; and the second patent will be considered as emanating at the time the first was granted; *Shaw v. Cooper*, 7 Pet. R. 292; *Morris v. Huntington*, 1 Paine's C. C. R. 348; *Grant et als. v. Raymond*, 6 Pet. R. 218; *The Philadelphia and Trenton R. Co. v. Stimpson*, 14 Pet. R. 448.

If a patent includes more than the actual invention, it is void; *Wood v. Underhill et als.*, 5 How. R. 1; *O'Reilly et al. v. Morse et al.*, 15 Id. 63; *Whitney et als. v. Emmett et als.*, 1 Baldw. R. 303; and the proper course under these circumstances is, for the inventor to enter a disclaimer for the excess. See ante, p. 185, note.

Nothing useless or frivolous, or injurious to the moral health or comfort of society, can be the subject of a patent; *Bedford v. Hunt et al.*, 1 Mas. R. 302; *Whitney et als. v. Emmett et als.*, 1 Baldw. R. 303; *Lowell*

Closely connected with the subject of patents is that of copyright (1). Copyright may be defined to be the exclusive right of multiplying copies of an original work or composition (*m*). From the nature of

(*m*) 14 M. & W. 316.*

v. Lewis, 1 Mas. R. 182; *Langdon v. De Groot*, 1 Paine's C. C. R. 203; consequently, where the principle of two machines is entirely similar, and the only difference consists in the latter being constructed of materials better adapted to the purposes for which it was made than the former, it was not considered as entitled to a patent, not being sufficiently useful; *Hotchkiss et al. v. Greenwood et al.*, 11 How. R. 266; *Stimpson v. The Baltimore and Susquehanna R. R. Co.*, 10 Id. 343.

On the subject of infringements of patents, see *McClurg et al. v. Kingsland et al.*, 1 How. R. 202; *Gaylor et al. v. Wilder*, 10 Id. 477; *Wilson v. Barnum*, 8 Id. 258; *Silsbee v. Foote*, 14 Id. 219; *Gray et al. v. James et als.*, 1 Pet. C. C. R. 394; *Dixon v. Moyer*, 4 Wash. C. C. R. 69; *Sawin et al. v. Guild*, 1 Gall. R. 485; *Evans v. Jordan et al.*, 1 Brockenb. R. 248.

(1) The acts of Congress of the 31st of May, 1709, and the 29th of April, 1802, are repealed by the act of February 3, 1831, 4 Stat. at Large, 436. By the first section of the last mentioned act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, or who shall invent, design, etch, engrave, work, or cause to be engraved, any print or engraving, and the executor or executors of such person or persons, shall have the sole right of printing, reprinting, publishing and vending the same, for the term of twenty-eight years from the time of recording the title thereof; and by the second section of the same act, the exclusive use above-mentioned may be renewed after the expiration of the said twenty-eight years, for the additional term of fourteen years, and if said person or persons shall be dead, then to the widow or

child or children of such deceased person. The fourth and fifth sections of the same act point out the manner in which application for a copyright must be made:—

“Sect. 4. And be it further enacted, That no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book, or books, map, chart, musical composition, print, cut or engraving, in the clerk's office of the District Court of the district wherein the author or proprietor shall reside, and the clerk of said court is hereby directed and required to record the same thereof forthwith, in a book to be kept for that purpose, in the words following, (giving a copy of the title under the seal of the court, to the said author or proprietor, whenever he shall require the same,) ‘District of ———, to wit: Be it remembered, that on the ——— day of ———, anno domini ———, A. B., of the said district, hath deposited in this office the title of a book, (map, chart, or otherwise, as the case may be;) in conformity with an act Congress, entitled An act to amend the several acts respecting copyrights. C. D., clerk of the district.’ For which record the clerk shall be entitled to receive, from the person claiming such right as aforesaid, fifty cents; and the like sum for every copy under seal, actually given to such person or his assigns. And the author or proprietor of any such book, map, chart, musical composition, print, cut, or engraving, shall, within three months from the publication of said book, map, chart, musical composition, print, cut, or engraving, deliver, or cause to be delivered, a copy of the same to the clerk of said district. And it shall be the duty of the clerk of each district court, at least once in every year, to transmit a certified list of all such records of copyright, includ-

this right it must almost necessarily have had its origin at a period subsequent to the invention of the art of printing. It is however the better opinion that such a right existed prior to the statute of Anne (*n*), by which the term of an author's copyright was first limited by the legislature (*o*). But this statute, together with others by which the copyright of authors was further secured (*p*), has been repealed by the act of the present reign to amend the law of copyright, on which the law of copyright now depends (*q*). By this act the copyright of every [*190] book (which term includes for the purposes of the *act every pamphlet, sheet of letter-press, sheet of music, map, chart or plan) published after the passing of the act in the lifetime of the author shall endure for his natural life, and for the further term of seven years from his death, and shall be the property of such author and his assigns; but if the term of seven years shall expire before the end of forty-two years from the first publication of the book, the copyright shall in that case endure for such period of forty-two years; and the copyright in every book published after the death of its author shall endure for forty-two years from the first publication thereof (*r*). By the same act the existing copyright in books then

(*n*) 8 Anne, c. 19.

(*o*) *Miller v. Taylor*, 4 Burr. 2303; *Donaldson v. Beckett*, 4 Burr. 2408; 2 Bro. P. C. 129; *Boosey v. Jefferys*, 6 Exch Rep. 592.*

(*p*) 41 Geo. III. c. 107; 54 Geo. III. c. 156.

(*q*) 5 & 6 Vict. c. 51.

(*r*) Sect. 3.

ing the titles so recorded, and the date of record, and also all the several copies of books or other works deposited in his office according to this act, to the secretary of state, to be preserved in his office.

"And be it further enacted, That no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured, by causing to be inserted, in the copies of each and every edition published during the term secured on the title page, or the page immediately following, if it be a book, or, if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz: 'Entered according to act of Congress, in the year ———, by A. B., in the clerk's office of the District Court of ———,' " (as the case may be.)

By an act of Congress of the 10th of August, 1846, Stats. at Large, (1846,) p. 106, it is enacted, That all persons who may be entitled to the privileges of copyright, now or hereafter, "shall, within three months" from publication, deliver, or cause to be delivered, one copy of their work "to the librarian of the Smithsonian Institution, and one copy of the same to the librarian of the Congress Library."

See for construction of these acts, *Jollin v. Jacques et al.*, Blatchf. R. 618; *Wheaton et al. v. Peters et al.*, 8 Pet. R. 591.

On the subject of the old acts of 1790 and 1802, see *Nichols v. Ruggles et al.*, 3 Day's Conn. R. 145; *Ewer et al. v. Cox et al.*, 4 Wash. C. C. R. 478.

published is extended for the full term provided by the act in the case of books thereafter published. But if the copyright belong wholly or partly to a publisher or other person, who has acquired it for any other consideration than that of natural love and affection, the copyright is not to be extended by the act, unless the author, if living, or his personal representative if he be dead, and the proprietor of such copyright, shall, before the expiration of the subsisting term of copyright, consent and agree to accept the benefits of the act, and shall register a minute of such consent in the prescribed form; in which case the copyright shall endure for the full term provided by the act, and shall be the property of the person or persons expressed in the minute (s). And in order to provide against the suppression of books of importance to the public, the Judicial Committee of the Privy Council are authorized, on complaint made to them, that the proprietor of the copyright in any book, after the death of its author, has refused to allow its republication, to grant a license to the complainant to publish the book in such manner and subject to such conditions as they may think fit (t). And with regard to encyclopædias, reviews and other periodical works, it is provided, *that the copyright [*191] in every article shall belong to the proprietor of the work for the same term as is given by the act to authors of books, whenever any such article shall have been or shall be composed on the terms that the copyright therein shall belong to such proprietor and be paid for by him (u); but payment must be actually made by the proprietor before the copyright can vest in him (x); and after the term of twenty-eight years from the first publication of any such article, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by the act; and during such term of twenty-eight years the proprietor shall not publish any such article separately without previously obtaining the consent of the author or his assigns. But any author may reserve to himself the right to publish any such composition in a separate form, and he will then be entitled to the copyright in such composition when published separately, without prejudice to the right of the proprietor of the encyclopædia, review or other periodical in which it may have first appeared (y). By the same act the sole liberty of representing any dramatic piece

(s) Sect. 4.

(t) Sect. 5.

(u) See *Bishop of Hereford v. Griffin*, 16 Sim. 190.(x) *Richardson v. Gilbert*, 1 Sim. N. S. 336.

(y) Sect. 18.

at any place of dramatic entertainment, and of performing any musical composition in any public place (*z*), is secured to the author and his assigns for the same term as is provided for the duration of copyright in books (*a*). The property in dramatic works had previously been secured to their authors for a shorter period by an act of the reign of King William the Fourth (*b*). It is now decided that a foreigner residing abroad is entitled to the copyright of any work composed by him and first published in this country (*e*)(1).

[*192] *By the same act a book of registry is required to be kept at Stationers' Hall, open to public inspection on payment of a small fee, in which may be registered the proprietorship and assignment of copyrights (*d*). And no proprietor of copyright in any book which shall be first published after the passing of the act can maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have caused such book to be registered pursuant to the act; but the omission to register will not affect the copyright in the book, but only the right to sue or proceed in respect of the infringement thereof. And the remedies of the proprietors of the sole liberty of representing any dramatic piece under the above-mentioned act of Will. IV. are not to be prejudiced, although no entry shall be made in the register book (*e*). And every registered proprietor is empowered to assign his interest by making entry in the book of registry of such assignment, and of the name and place of abode of the assignee, in the form given in a schedule to the act; and such assignment so entered is declared to be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and to be of the same force and effect as if such assignment had been made by deed (*f*)(2). But if the right of representing

(*z*) Russell v. Smith, 15 Sim. 181; 12 Q. B. 217.*

(*a*) Sect. 30.

(*b*) 3 & 4 Will. IV. c. 15.

(*c*) Boosey v. Davidson, 13 Q. B. 257; *Boosey v. Jefferys, 6 Exch. Rep. 580.*

(*d*) 5 & 6 Vict. c. 45, ss. 11, 19, 20.

(*e*) Sect. 24.

(*f*) Sect. 13.

(1) See post, p. 196, note.

(2) The first section of an act of Congress of the 30th of June, 1834, (4 Statutes at large, 728,) directs that deeds of assignment of copyrights, being acknowledged in

the manner usual with deeds for the conveyance of land, shall be recorded in the office in which the original copyright is recorded, within sixty days after the assignment.

any dramatic piece or performing any musical composition is intended to pass to the assignee of the copyright, an entry must be expressly made of such intention (*g*).

The act also expressly provides, that all copyrights protected by the act shall be deemed personal property, *and shall be trans- [*193] missible by bequest; or in case of intestacy, shall be subject to the same laws of distribution as other personal property (*h*).

In order to give more effectual protection to persons entitled to the copyright of books, it is also provided that no person, not being the proprietor of the copyright, or some person authorized by him, may import into any part of the united kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the united kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions (*i*). And by a subsequent act (*k*), books, wherein the copy right is subsisting, first composed or written or printed in the united kingdom, and printed or reprinted in any other country, are absolutely prohibited to be imported into the British possessions abroad, provided the proprietor of such copyright, or his agent, shall have given notice in writing to the commissioners of customs that such copyright subsists, and in such notice shall have stated when the copyright will expire. But by a more recent act (*l*) it is provided, that in case the proper legislative authorities in any British possession shall make any act or ordinance to make due provision for securing the rights of British authors in such possession, her Majesty, on the same being transmitted to the Secretary of State,

(*g*) Sect. 22.

(*h*) Sect. 25.

(*i*) Sect 17.

(*k*) Stat. 8 & 9 Vict. c. 93, s. 9.

(*l*) Stat. 10 & 11 Vict. c. 95.

But the assignment, if not recorded, is nevertheless valid as between the parties, and also, as to all persons not claiming under the assignors; *Webb et al. v. Powers et al.*, 2 Wood. & Min. R. 497.

An assignment made by one entitled to a copyright, will only convey the present right of the author, and will not cover any future right to which he may be entitled by reason of the renewal of his right, unless it is clearly indicated that such future right shall also be assigned; this is based upon the principle, that the laws were intended for the benefit of the authors themselves; *Pierpont v. Fowle*, 2 Wood. & Min. R. 23.

may, if she think fit so to do, express her royal approval of such act or ordinance, and thereupon may issue an order in council declaring that, so long as the provisions of such act or ordinance continue in force within such colony, the prohibitions contained in the above-mentioned acts, or in any other acts, with respect to foreign [*194] *reprints of books first composed, written, printed or published in the united kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such order in council.

By acts of parliament of an older date, copyright has also been created in prints, engravings, maps, charts and plans for the term of twenty-eight years, to commence from the day of first publishing thereof; which day, together with the proprietor's name, is to be truly engraved on each plate, and printed on every print (*m*)(1). But these acts do not apply to illustrative wood engravings printed on the same sheet as the letter-press of a book, as such engravings form part of the book and are comprised within its copyright (*n*). Under these acts, the assignee of the copyright may bring an action in his own name against any person who may pirate it (*o*). And by a recent statute (*p*) all the provisions contained in these acts are extended to the united kingdom of Great Britain and Ireland. And it is provided (*q*) that, if any person shall, during the existence of the copyright, engrave, etch, or publish any engraving or print of any description whatever, either in whole or in part, already published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first obtained in writing signed by him, her, or them respectively, with *his, her or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor may, by a separate action upon the case, to be brought against the person so offending, in any court of law in

(*m*) 8 Geo. II. c. 13, amended by 7 Geo. III. c. 38, and rendered more effectual by 17 Geo. III. c. 57.

(*n*) *Bogue v. Houlston*, V. C. Parker, 16 Jurist, 372.

(*o*) *Thompson v. Symonds*, 5 T. Rep. 41.

(*p*) Stat. 6 & 7 Will. IV. c. 59, s. 1.

(*q*) Sect. 2.

(1) See ante, p. 189, note.

Great Britain or Ireland, recover such damages as the jury shall assess, together with double costs of suit. By a more recent act it is declared that the provisions of the above-mentioned statutes are intended to include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely (*r*).

By other acts of parliament copyright has been granted to the makers of new and original sculptures, models, copies and casts for the term of fourteen years from their first putting forth or publishing the same (*s*), with a further term of fourteen years to the original maker, if he shall be then living (*t*): provided that in every case the proprietor cause his name, with the date, to be put on every such sculpture, model, copy or cast before the same shall be put forth or published (*u*)(1). And it is also provided that no person who shall purchase the right or property of any such sculpture, model, copy or cast of the proprietor, expressed in a deed in writing signed by him with his own hand, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying, casting, or vending the same (*x*). By the Designs Act, 1850 (*y*), provision has been made for the registration of sculptures, models, copies and casts within the protection of the Sculpture Copyright Acts, which registration entitles*the proprietor *of the copyright to certain penal- [*196] ties in case of piracy (*z*).

(*r*) Stat. 15 & 16 Vict. c. 12, s. 14.

(*s*) 38 Geo. III. c. 71, amended by 54 Geo. III. c. 56.

(*t*) 54 Geo. III. c. 56, s. 6.

(*u*) Sect. 1.

(*x*) Sect. 4.

(*y*) Stat. 13 & 14 Vict. c. 104, s. 6.

(*z*) Sect. 7.

(1) The Act of Congress of Aug. 29, 1842, (5 Statutes at Large, 543), authorizes a patent to be granted to a citizen, or an alien who has resided one year in the United States, and taken an oath of his intention to become a citizen, for the invention or production of "any new and original design for a manufacture, whether of metal or of other material or materials, or any new and original design for the printing of woolen, silk, cotton, or other fabrics, or any new and original design for a bust, statue, or bas-relief, or composition in alto or basso relievo, and any new or original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed, or painted, or cast, or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others."

By an act of parliament recently passed to amend the law of international copyright (*a*), her Majesty is empowered by any order in council to grant the privilege of copy right for such period as shall be defined in such order (not exceeding the term allowed in this country,) to the authors, inventors and makers of books, prints, articles of sculpture, and other works of art, or any particular class of them, to be defined in such order, which shall, after a future time to be specified in such order, be first published in any foreign country, to be named in such order (*1*). And her Majesty is also empowered (*b*) by any order in council to direct that the authors of dramatic pieces and musical compositions, which shall, after a future time to be specified in such order, be first publicly represented or performed in any foreign country, to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period allowed in this country. Provision however is made for the entry of proper particulars of the subjects for which copyright shall be granted, in the register book of the Stationers' Company in London, within a time to be prescribed in each such order in council (*c*). And all copies of books wherein there shall be any subsisting copyright by virtue of this act, or of any order in council made in pursuance thereof, printed or reprinted in any foreign country, except that in which such books were first published, are absolutely [**197*] prohibited to be imported into any part of the British *dominions, except with the consent of the registered proprietor of the copyright thereof, or his agent authorized in writing (*d*). But no such order in council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign power named in such order in council, for the benefit of parties interested in works first published in the

(*a*) Stat. 7 & 8 Vict. c. 12, ss. 2, 3, 4.

(*b*) Sect. 5.

(*c*) Sects. 6, 7, 8, 9.

(*d*) Sect. 10.

(1) An International Copyright has never been a part of our system, on the contrary, it is declared by the eighth section of the Act of Congress, of Feb. 3, 1841, that nothing in that act shall "be construed to extend to prohibiting the importation or vending, printing or publishing, of any map, chart, book, musical composition, print or engraving, written, composed, or made by any person not being a citizen of the United States, nor resident within the jurisdiction thereof."

dominions of her Majesty, similar to those comprised in such order (*e*). And every such order in council is to be published in the London Gazette as soon as may be after the making thereof, and from the time of such publication shall have the same effect as if every part thereof were included in the act (*f*). And no copyright is allowed to any book, dramatic piece, musical composition, print, article of sculpture, or other work of art, first published out of her Majesty's dominions, otherwise than under this act. A convention under this act has already been effected with France, the stipulations of which have been confirmed by act of parliament (*g*). And the provisions of the International Copyright Act have been extended to authorized translations of foreign books for a term not exceeding five years from the first publication of such translations (*h*); also to authorized translations of foreign dramatic pieces for a term not exceeding five years from the time at which the authorized translations are first published or publicly represented (*i*), but so as not to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country (*j*).

By recent statutes a copyright has been granted to designs for articles of manufacture for the term of three *years, one year, [*198] or nine calendar months, according to the nature of the manufacture (*k*) (1); and, in pursuance of these acts, a registrar of designs for articles of manufacture has been appointed, by whom all designs to be protected by the acts are required to be registered (*l*); and provision is also made for the transfer of the copyright in such designs by any writing purporting to be a transfer, and signed by the proprietor, and also for the registration of transfers in a prescribed form (*m*). These acts have been extended and amended by the Designs Act, 1850 (*n*), which provides for the "provisional registration" of designs for the term of one year, and empowers the Board of Trade to extend

(*e*) Sect. 14.

(*f*) Sect. 15.

(*g*) Stat. 15 & 16 Vict. c. 12.

(*h*) Sects. 1, 2, 3, 4.

(*i*) Sects. 4, 5.

(*j*) Sect. 6.

(*k*) 5 & 6 Vict. c. 100, by which all the previous statutes were consolidated, and 6 & 7 Vict. c. 65.

(*l*) 6 & 7 Vict. c. 65, ss. 7, 8, 9.

(*m*) 5 & 6 Vict. c. 100, s. 6; 6 & 7 Vict. c. 65, s. 6.

(*n*) Stat. 13 & 14 Vict. c. 104. See also stats. 14 & 15 Vict. c. 8, extended by stat. 15 & 16 Vict. c. 6.

(1) See ante, p. 195, note [*d*].

the copyright in ornamental designs for such term, not exceeding the additional term of three years, as the board may think fit (o) (1).

(o) Sect. 9.

(1) There can be no copyright of an abstract idea; a thing invented, but not visible to others; the invention must, in addition, have been designed or represented in some visible form; *Binns v. Woodruff*, 4 Wash. C. C. R. 48; and it must be of something new and original, and not merely a copy from something already produced, with only such alterations, as a person of skill and experience could readily make, *Jolten v. Jacques et al.*, Blatchf. R. 618; *Webb et al. v. Powers et al.*, 2 Wood. & Min. R. 497; but it matters not whether the materials of the compilation be new or old; *Emerson v. Davies et al.*, 3 Story's R. 768; for, every one may have the right to use the materials, and yet the compilation be the subject of copyright; *Gray et al. v. Russel et als.*, 1 Story's R. 11. But a distinction is to be noticed between a compilation and an abridgment, for if a compilation, be made of materials which are not open to all, but of the work of another for which a copyright has been obtained, it is an infringement of that right, *Webb et al. v. Powers et al.*, 2 Wood. & Min. R. 497; but an abridgment, being not a mere compilation of the work of another, but a substantial condensation of the materials of the original work, requiring intellectual ability, and judgment, and labor, is not an infringement of a copyright, but is itself a subject of copyright, notwithstanding a copyright has been obtained by the author of the previous work, of which it is an abridgment; *Folsom et als. v. Marsh et als.*, 2 Story's R. 100; *Story's exec's v. Holcombe et al.*, 4 McLean's R. 306.

By the common law an author has a property in his manuscript, so long as he does not abandon it to the public; *Bartlette v. Crittenden et al.*, 4 McLean's R. 300; *Wheaton et al. v. Peters et al.*, 8 Pet. R. 591; but the sending of a letter by post is not considered as an abandonment of it, and the sole right of publishing still re-

mains in the author; *Denis v. Leclere*, 1 Mart. La. R. 297; *Folsom et als. v. Marsh et als.*, 2 Story's R. 100; *Wetmore v. Scovell et als.*, 3 Edw. Ch. R. 515; and in accordance with the same principle it has been held, that where a manuscript had been used for the purposes of instruction, the author had not thereby abandoned it, even though the pupils had taken copies of it; *Bartlette v. Crittenden et al.*, 4 McL. R. 300.

The case of *Stephens v. Cady*, 14 How. R. 529, decides that a copyright is not the subject of an execution at common law—a copper-plate engraving was taken in execution, and Justice NELSON in his opinion, remarks, "The copper-plate engraving, like any other tangible personal property, is the subject of seizure and sale, on execution. And the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of his map, by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure and sale by means of this process—certainly not at common law. No doubt the property may be reached by a creditors' bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of the creditors."

On the subject of infringement of copyright, see *Backus v. Gould et al.*, 7 How. R. 798; *Story's exec's v. Holcombe et al.*, 4 McLean's R. 306; *Jollin v. Jacques et al.*, Blatchf. R. 618; *Webb et al. v. Powers et al.*, 2 Wood. & Min. R. 497; *Stowe v. Thomas*, 2 Wallace, Jr.'s R. 547; in this last case, which is one of the most recent on the subject of copyright, it was decided, that the translation into another language, of a book for which a copyright was granted, was not an infringement of that right.

*PART IV.

[*199]

OF PERSONAL ESTATE GENERALLY.

CHAPTER I.

OF SETTLEMENTS OF PERSONAL PROPERTY.

PERSONAL property is capable of being settled, but not in the same manner as land. Land being held by estates, is settled by means of life estates being given to some persons, with estates in remainder in tail and in fee simple to others. But personal property, as we have already observed^(a), is essentially the subject of absolute ownership. The settlement of such property, by the creation of estates in it, cannot therefore be accomplished. And there is a striking difference in many cases between the effect of the same limitation, according as it may be applied to real or to personal property.

As there can be no estate in personal property, it follows that there can be no such thing as an estate for life in such property in the strict meaning of the phrase. Thus if any chattel, whether real or personal, be assigned to A. for his life, A. will at once become entitled in law to the whole. By the assignment, the property in the chattel passes to him, and the law knows nothing of a reversion in such chattel remaining in the assignor. And this is the case even though the chattel be a term of years of such a length (for instance 1000 years) that A. could not possibly live so long^(b) (1). The term is considered* in law as an indivisible chattel, and consequently incapable of [*200] any such modification of ownership as is contained in a life estate.

(a) Ante, p. 7.

(b) 2 Pres. Abst. 5.

(1) A term of years, whether for one year, or for one thousand, is personal property; *Petition of Timothy Gray*, 5 Mass. R. 419; *Brewster v. Hill*, 1 N. H. R. 350; *Dillingham v. Jenkins*, 7 Smed. & Mars. R. 487; *The Widow and Heirs of Reynolds v. The Commissioners of Stark Co.*, 5 O. R. 204; *Field v. Howell*, 6 Geo. R. 423; *William's exec's v. The Mayor, &c., of Annapolis*, 6 Har. & Johns. R. 529; although the legislatures of some of the States have enacted, that under certain circumstances, they shall be considered real property, and in other States they have been made subject to the rules and regulations prescribed with respect to real estate; thus, by the

An apparent exception to the above rule has long been established in the case of a bequest by will of a term of years to a person for his life: in this case the intention of the testator is carried into effect by the application of a doctrine similar to that of executory devises of

Revised Statutes of Mass., (1836), p. 411, sec. 18, "When land is demised for the term of one hundred years or more, the term shall, so long as fifty years of the same remain unexpired, be regarded as an estate in fee simple, as to everything concerning the descent and devise thereof, upon the decease of the owner, the right of dower therein, and the sale thereof by executors, administrators, or guardians, by license from any court; and also concerning the levy of executions thereon, and the redemption thereof, when taken in execution or when mortgaged;" and by 2d Vol. Revis. Stats. of N. Y., (3d ed.), p. 11, sec. 24, "A freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years." In Ohio, "Permanent leasehold estates, renewable forever, shall be subject to the same law of descent and distribution as estates in fee are or may be subject to;" Swan's Stats. of O., p. 289; and see also note (a), on the same page. The laws of Pennsylvania enjoin the recording of leases for a longer term than twenty-one years, as deeds of land are recorded, *Purd. Dig.*, by Brightly, (1853), p. 228, secs. 62 and 63. The Compiled Stats. of N. H., (1853), p. 289, contain a similar provision with respect to leases of a longer duration than seven years; and the Stats. of Vt., (1839), p. 312, sec. 6, fix the term of years which must be acknowledged by the grantor, and recorded, at any period greater than one year.

Notwithstanding the Statute of Ohio making permanent leaseholds subject to all the laws and rules applicable to land, with

regard to descent and distribution, it is still to be doubted whether they are to be regarded as realty in that state; the early case of *The Lessee of Bisbee v. Hall*, 3 O. R. 465, which occurred before the enactment of the statute above referred to, decided that leases were subject to the laws of personal property; the subsequent case of *Murdock et al. v. Ratcliffe*, 7 O. R. 123, in interpreting a statute then in force, which declared that the tenants or lessees should enjoy all the rights and privileges which they would be entitled to enjoy did they hold their lands in fee simple, says, this provision, was "designed, in our opinion, to secure to tenants, civil and political privileges, not to change the quality of their estates." The statute above referred to, Swan's Stats. of Ohio, 289, having been passed, it was ruled in *Loring v. McClendy et als.*, 11 O. R. 335, that a permanent leasehold estate is not a chattel, but realty; which is shaken, if not overruled, in *The Lessee of Boyd et al. v. Talbert*, 12 O. R. 213, where Chief Justice LANE, remarks, "The question whether a lease be a realty or personalty, need not be here determined; but I take the opportunity to express my apprehension, that the case reported last year," (*Loring v. McClendy et als.*, 11 O. R. 355), "does not conclude this point, and I shall be ready to consider it when it becomes necessary." This is followed by *The Northern Bank of Kentucky v. Roosa*, 13 O. R. 334, explaining *Loring v. McClendy*, and deciding that judgments are liens, without levy for one year on permanent leaseholds as upon other real estate.

Strictly speaking, there cannot be a limitation of personal property after an estate for life in it; nevertheless, this may be attained by means of an executory devise, or deed of trust; *Cooper v. Cooper*, 2 Brevard's R. 355; and the only question

real estate (c). The whole term of years is considered as vesting in the legatee for life, in the same manner as under an assignment by

(c) See Principles of the Law of Real Property, 249, 2d ed.; 256, 3d ed.

to be determined in order to decide upon the validity of the limitation, is, whether it tends to create a perpetuity, that is, whether it is impossible for it to take effect, and be executed within a life or lives in being, and twenty-one years added to the period of gestation, afterwards; if it will it is a valid limitation; *Griggs v. Dodge*, 2 Bay's R. 28; *Taber v. Packwood*, Id. 52; *Nevison et al. v. Taylor*, adm'r, 3 Halst. R. 43; *Horne et al. v. Lyeth*, 4 Har. & Johns. R. 431; *Keating v. Reynolds*, Bay's R. 80; *Cordle's adm'r v. Cordle's exec.*, 6 Munf. R. 455; *Timberlake v. Graves*, Id. 174; *Drury et al. v. Grace*, 2 Har. & Johns. R. 356; *Jackson v. Blanshaw*, 3 Johns. R. 292; *Paterson v. Ellis's exec's*, 11 Wend. R. 259; *Scott exec. v. Price exec.*, 2 Serg. & Raw. R. 59; *Mifflin v. Neal*, adm'r, 6 Id. 460; *Cassilly et al. v. Meyer et al.* 4 Md. R. 1.

In *Horne et al. v. Lyeth*, 4 Har. & Johns. R. 431, Chief Justice DORSEY, uses the following words, "Having thus briefly examined what would have been the operation of this bequest, if the subject-matter had been a frank-tenant, (and in doing this we were necessarily led upon an inquiry concerning the meaning and legal effect of the word 'heirs' and 'heirs of the body,' when limited upon a preceding estate of freehold), we shall now consider the bequest as applicable to chattel, interest, or leasehold property.

"At one period of our law, if a term for years or chattel was bequeathed to one for life, and after his death to a third person, the ulterior limitation was considered void, and the whole interest of the term or thing became vested in the first devisee; but in process of time, this doctrine was abandoned, and courts of justice, on grounds of general utility and public convenience, sustained the superadded limitation as an executory devise, * * * * if a leasehold

estate is limited to one for life, remainder to the 'heirs of his body,' the whole interest vests in the first taker, and the words, "for life," will not be sufficient to restrain his interest to a life estate. But if words of limitation are superadded to the words, 'heirs of the body,' such additional limitation is considered as indicative of an intention to give only a life estate. * * * If the words, 'heirs of the body,' (which naturally point to children and their descendants,) are considered as words of limitation, and enlarge the estate of the first devisee to an absolute interest, why should not the word 'heirs,' so comprehensive in its signification, give as great an interest."

In accordance with the doctrine, that if personal property be given to one for life, remainder to his heirs, or to the heirs of his body, he will take absolutely, unless there be words to show that only an estate for life was intended, see the following cases; *Keating v. Reynolds*, 1 Bay's R. 80; *Exec's of Moffat v. Strong*, 10 Johns. R. 12; *Guery v. Vernon*, 1 Nott & McC. R. 69; *Dott et als. v. Cunningham*, 1 Bay's R. 453; *Powell v. Glenn et al.*, 21 Alab. R. 458; *Durden's adm'r v. Burns's adm'r*, et al., 6 Id. 363; *Cruger et al. v. Heyward exec. et al.*, 2 Dessaus. R. 94; *McGran v. Davenport*, 6 Port. R. 319; *Williams v. Graves, exec.*, 17 Alab. R. 62; *Ewing v. Standifer et al.*, 18 Id. 400; *Woodley v. Findlay et al.*, 9 Id. 716; *Machen v. Machen*, 15 Id. 373; *Powell v. Brandon*, 24 Missi. R. 344. But see to the contrary, *Paterson v. Ellis' adm'r*, 11 Wend. R. 259.

Bequests of slaves to one for life, remainder to his heirs or the heirs of his body, peculiarly illustrate the above doctrine; in such cases it has been held, that the limitation over is good, inasmuch as the bequest was of a life in being, as the limitation over could never by possibility take

deed; but on his decease the term is held to shift away from him, and to vest, by way of *executory bequest*, in the person to be next entitled (*d*). Accordingly, if a term of years be bequeathed to A. for his life, and after his decease to B., A. will have, during his life, the whole term vested in him, and B. will have no vested estate, but a mere *possibility*, as it is termed (*e*), until after the decease of A.; and this possibility, like the possibility of obtaining a real estate, was formerly inalienable at law unless by will (*f*), though capable of assignment in equity (*g*). But by the act to amend the law of real property (*h*), which repeals an act of the previous session passed for the same purpose (*i*), it is now provided that an executory and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure may be disposed of by deed. B. may therefore, during the life of A., assign his expectancy by deed; and [*201] such assignment will entitle the assignee to the *whole term on A.'s decease. If, however, no such assignment should have been made, B. will become, on the decease of A., possessed of the whole term, which will then shift to B. by virtue of the executory bequest in his favour. The mere circumstance, indeed, of the term being bequeathed to A. for his life only, will operate to shift away the term on his decease (*k*), independently of the bequest to B.; so that, if there had been no bequest over to B., the interest of A. would continue only during his life, and would then remain part of the undisposed of property of the testator. It may, however, be doubted

(*d*) Matthew Manning's case, 8 Rep. 95; Lampert's case, 10 Rep. 47.

(*e*) See Principles of the Law of Real Property; 223, 2d ed.; 230, 3d ed.

(*f*) Shep. Touch. 239.

(*g*) Fearn, Cont. Rem. 548.

(*h*) Stat. 8 & 9 Vict. c. 106, s. 6.

(*i*) Stat. 7 & 8 Vict. c. 76, s. 5.

(*k*) Eyres v. Faulkland, 1 Salk. 231; Ker v. Lord Dungannon, 1 Dru. & War. 509, 528,

effect but in his lifetime, the term of servitude expiring with his life; *Biscoe v. Biscoe*, 6 Gill & Johns. R. 232; *Roberg v. Hammond*, 2 Har. & Gill's R. 42; *Royall v. Eppes adm'r*, 2 Munf. R. 479; *Dashiel v. Dashiel*, 2 Har. & Gill's R. 127; *Bell v. Hogan*, 1 Stew. R. 536; *Usilton v. Usilton et al.*, 3 Md. Ch. Dec. 36. On the contrary, where the bequest has been of the slaves *with their increase*, the limitation over has been held too remote, unless restrained by words showing that an estate for life only was intended, and avoiding the creation of a perpetuity; *Johnson v. Negro Lish*, 4 Har. & Johns. R. 441; *Daridge v. Chancy*, 4 Har. & McHen. R. 393; *Halton v. Weems*, 12 Gill & Johns. R. 852; *Cox v. Buck*, 5 Richard. R. 604; *Shepherd v. Shepherd*, 2 Richard. Eq. R. 142; *Henry v. Tilder*, 2 McC. R. 323.

whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real (l) (1).

The strict and ancient doctrine of the indivisibility of a chattel, though still retained by the courts of law, has no place in the modern Court of Chancery, which, in administering equity, carries out to the utmost the intentions of the parties. In equity therefore, under a gift of personal property of any kind to A. for his life, and after his decease to B., A. is merely entitled to a life interest, and B. has, during the life of A., a vested interest in remainder, of which he may dispose at his pleasure; and the Court of Chancery will compel the person to whom the courts of law may have awarded the legal interest, to make good the disposition (2). Accordingly, if the personal property so given should consist of moveable goods, equity will compel A., the owner for life, to furnish and sign an inventory of the goods, and an undertaking to take proper care of them (m). This doctrine, however, is comparatively of modern date; for formerly the Court of Chancery followed the rules *of law in the construction of such gifts; and if a gift of moveable goods had [*202] been made to A. for his life, and after his decease to B., they would not have afforded to B. any assistance after A.'s decease (n). But if the gift had been of the *use or enjoyment* of the goods only to A. for his life, and after his decease to B., the court would then have assisted B., by declaring A.'s representatives after his decease to be trustees only for the benefit of B. (o). But this distinction is now exploded; and in all cases, as we have said, modern equity will assist the donee

(l) Fearn, Cont. Rem. 413. See, however, 1 Jarm. Wills, 793; Hoare v. Parker, 2 T. Rep. 376.

(m) Fearn, Cont. Rem. 407; Conduitt v. Soane, 1 Coll. 285.

(n) Fearn, Cont. Rem. 402.

(o) Ibid. 404.

(1) But see Cooper v. Cooper, 2 Brevard's v. Glenn et al., 21 Alab. R. 458; Patterson v. R. 355; Grigg's v. Dodge, 2 Day's R. 28; Ellis's exec., 11 Wend. R. 259; Bell v. Hotan, 1 Stew. R. 536; Scott, exec. v. Price, v. Taylor, adm'r., 3 Halst. R. 43; Cordle's exec., 2 Serg. & Raw. R. 59; Williams v. adm'r v. Corde's exec., 6 Munf. R. 455; Graves, exec., 17 Alab. R. 62; Mifflin v. Timberlake v. Graves, Id. 174; Guery v. Neal, adm'r, 6 Serg. & Raw. R. 460; Usilton v. Usilton et al., 3 Md. Ch. Decs. 36; Biscoe, 6 Gill & Johs. R. 232; Raborg v. Woodley v. Findlay et al., 9 Alab. R. 716; Hammond, 2 Har. & Gill's R. 42; Royal Machen v. Machen, 15 Id. 373. And see v. Eppes adm'r., 2 Munf. R. 479; Dashiell also ante, p. 199, note 1.

v. Dashiell, 2 Har. & Gill's R. 127; Powell (2) See ante, p. 199, note.

in remainder, to whom any gift of personal estate may be made after the decease of another who is to have them only for his life (*p*). When therefore it is wished to make a settlement of any kind of personal property, the doctrine of the Court of Chancery is at once resorted to. The property is assigned to trustees, *in trust* for A. for his life, and after his decease *in trust* for B., &c. This assignment to the trustees vests in them the whole legal interest in the property; and in a court of law, they are held to be absolutely entitled to it; for the Statute of Uses (*q*) has no application to any kind of personal estate. But in equity the trustees are compellable to pay the entire income to A. for his life, and after his decease to B., and so on, according to the trusts of the settlement; and if B. should alien his interest during the life of A., the trustees will be bound, on having notice of the disposition, to stand possessed of the property, after A.'s decease, in trust for the alienee (*r*).

• When shares in joint stock companies are settled in the manner above mentioned, it sometimes becomes a question whether any extra-
 [*203] ordinary profit which may *be divided amongst the shareholders by way of bonus should be considered as capital or as interest. The equitable tenant for life is too frequently inclined to consider himself entitled to any bonus in the same manner as to ordinary dividends. The Court of Chancery, however, usually considers every bonus, whether consisting of additional joint stock or shares (*s*), or simply of money (*t*), as part of the capital, unless it appear to be nothing more than an increased dividend arising from the increased profits of the year (*u*). In the absence, therefore, of any special provision to the contrary, every bonus ought to be invested upon the trusts of the settlement, and the income only paid to the tenant for life.

By a recent act of parliament (*v*), on the decease of a person enti-

(*p*) Ibid. 406.

(*q*) 27 Hen. VIII. c. 10; Principles of the Law of Real Property, 126, 2d ed.; 131, 3d ed.

(*r*) A form of marriage settlement of stock and other personal estate upon the usual trusts will be found in Appendix B.

(*s*) Brander v. Brander, 4 Ves. 800; Hooper v. Rossiter, 13 Price, 774; * S. C. McClelland, 527.

(*t*) Paris v. Paris, 10 Ves. 185; Ward v. Combe, 7 Sim. 634.

(*u*) Barclay v. Wainwright, 14 Ves. 66; Price v. Anderson, 15 Sim. 473; Preston v. elville, 16 Sim. 163.

(*v*) Stat. 4 & 5 Will. IV. c. 22, s. 2.

tled to a life interest in any property, whether real or personal, his executors or administrators are entitled to recover from the remainderman an apportioned part of the next payment of the income, according to the time which shall have elapsed since the last period of payment, up to and including the day of the decease of such person (1). And when any other limited interest determines, a similar right to an apportionment is also given. But the act makes no apportionment of rent between the heir or devisee and the executor of a tenant in fee simple (*w*). And where the property ceases with the interest, and does not go over to another, as in the case of a life annuity, the act appears inapplicable; and the right to an apportioned part should therefore, if desired,* be expressly conferred (*x*). The act extends only to instruments executed, and wills coming into operation, after [*204] the passing of the act, which took place on the 16th June, 1834 (*y*);

(*w*) *Browne v. Amyot*, 3 Hare, 173, 183; *Beer v. Beer*, C. P. 16 Jur. 223, 225.

(*x*) But see *Carter v. Taggart*, 16 Sim. 447.

(*y*) *Michell v. Michell*, 4 Beav. 549; *Knight v. Boughton*, 12 Beav. 312.

(1) At common law there can be no apportionment of rent; *Zule v. Zule*, 24 Wend. R. 76; *Bank of Penna. v. Wise*, 3 Wat. R. 397, in which last case it was decided, that "the idea of apportioning the rent that becomes payable after the purchaser of a reversionary interest in fee at a sheriff's sale, has paid the purchase-money, and received his deed of conveyance for it, between him and the defendant in the execution as whose estate it was sold, is unknown to the law, and cannot be reconciled with any of its analogous and fixed principles." But by a statute of Pennsylvania, where a tenant fraudulently removes from the premises the goods and chattels liable to distress, in order to deprive the landlord of his remedy, the rent may be apportioned up to the time of such fraudulent removal, and a distress forthwith made; *Brightly's Purd. Dig.* 500, sect. 6.

Where, however, one is entitled for life to the interest of a certain sum charged on real estate, and dies, the income may be apportioned, so that the interest which may accrue, between the day on which the interest was regularly payable, and the day of the death, will be paid to the executor or administrator; *Sweigart v. Frey*, adm'r,

8 Serg. & Raw. R. 299; see also *Green exec. v. Osborn*, 17 Id. 171; *Cole v. Patterson*, 25 Wend. R. 456. In accordance with the principle ruling the last mentioned cases, namely, that the interest is terminated by the act of God, it has been held, that where a slave is hired for a year and dies, his wages should be apportioned; *Bacot v. Parnell*, 2 Bail. R. 424; *George v. Elliott*, 2 Hen. & Munf. R. 5.

In the State of South Carolina, an overseer hired for a year, who is turned away for misconduct, may nevertheless recover for the services actually performed while he conducted himself properly; *Eakin v. Harrison*, 4 McCord's R. 249; but if he has been negligent in his duties, or loss has occurred by his leaving the service, he can recover nothing; *Byrd v. Boyd*, Id. 246; and of these matters a jury will judge, as well as of the amount to which he may be entitled; *McClure v. Pyatt*, Id. 26. It seems, also, that in the same State "if one rents a house for a year, and during the term it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied;" *Ripley v. Wightman*, 4 McCord's R. 447.

and its provisions do not apply to any case in which it is expressly stipulated that no apportionment shall take place, or to annul sums made payable in policies of assurance of any description (z). Previously to this act no apportionment was made of annuities, or of the dividends of stock settled in trust for one person for life, with remainder to another; but the remainderman was entitled to the whole of the annuity or dividend which fell due next after the decease of the person entitled for life (a). But in a case where the tenant for life of stock died on the day on which a half-year's dividend became due, it was held that it belonged to his personal estate (b). If any annuity were given for the maintenance of an infant (c), or of a married woman living separate from her husband (d), the necessity of the case was considered a ground for presuming that an apportionment was intended. The interest of money lent was also always apportioned; for though the payment of such interest be made half-yearly, yet it becomes due *de die in diem*, so long as the principal remains unpaid (e).

An estate tail, such as that created by a gift of lands to a man and the heirs of his body (f), has nothing [*205] analogous to it in personal property. An estate tail cannot be held in such property at law, neither does equity admit of any similar interest. A gift of personal property of any kind to A. and the heirs of his body will simply vest in him the property given (g). And in the construction of wills, where many informal expressions are allowed to vest an estate tail in lands, the general rule is, that expressions, which if applied to real estate would confer an estate tail, shall, when applied to personal property, simply give the absolute interest (h). The same effect will be produced by a gift of such property to a man and his heirs. The words "heirs," and "heirs of his body," are quite inapplicable to personal estate; the heir, as heir, has nothing to do with

(z) Stat. 4 & 5 Will. IV. c. 22, s. 3.

(a) Pearly v. Smith, 3 Atk. 260; Sherrard v. Sherrard, 3 Atk. 502; Warden v. Ashburner, 2 De Gex. & Smale, 366.

(b) Patton v. Sheppard, 10 Sim. 186.

(c) Hay v. Palmer, 2 P. Wms. 501; 1 Swanst. 349, note.

(d) Howell v. Hanforth, 2 W. Black. 1016.

(e) Edwards v. Countess of Warwick, 2 P. Wms. 176; Banner v. Lowe, 13 Ves. 135.

(f) See Principles of the Law of Real Property, 28, 2d ed.; 30, 3d ed.

(g) Fearn, Cont. Rem. 461, 463.

(h) 2 Jarm. Wills, 489.

the personal property of his ancestor (1). Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A. simply, without more, is sufficient to vest in him the absolute interest (*i*). Whilst, under the very same words, he would acquire a life interest only in real estate (*j*), he will become absolutely entitled to personal property. Thus a gift of lands to A. for life, and after his decease to B., gives to B. a mere life interest in remainder expectant on the decease of A. (*k*); unless indeed the gift be by will under the act for the amendment of the laws with respect to wills (*l*); But a gift of personal property to A. for life, and after his decease to B., gives to B. a vested equitable interest in the corpus or body of the fund, to which he becomes absolutely entitled, subject *only to A.'s life interest; and the circumstance of B.'s dying in the lifetime of A. would be [206] immaterial (*m*).

It is true that in deeds and other legal instruments, it is usual to transfer personal estate absolutely, by the use of the words "executors, administrators, and assigns." As real estate is conveyed to a man,

(*i*) *Byng v. Lord Strafford*, 5 Beav. 558.

(*j*) *Principles of the Law of Real Property*, 17, 114, 2d ed.; 18, 119, 3d ed.

(*k*) *Goodtitle d. Richards v. Edmonds*, 7 T. Rep. 635.

(*l*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 28.

(*m*) *Benyon v. Maddison*, 2 Bro. C. C. 75.

(1) *Comfort v. Mather*, 2 Wat. & Serg. R. 450, was the case of a bequest "to S. E., wife of J. E.," of the sum of \$1000, to have and to hold to her the said S. E., her heirs and assigns, for ever;" and S. E. having died before the testator, it was held, that the bequest lapsed, SERGEANT, J., remarking, that it had been "repeatedly and uniformly decided, in conformity to a principle of law, which is said to have been borrowed from the civil law, that every legacy implies a condition that the legatee shall survive the testator, and that where the legatee dies in the lifetime of the testator, the legacy lapses. The legislature of this State (Penna.) has, by the act of 19th of March, 1810, corrected the rule where a legacy is in favour of a child or other lineal descendant of the testator, declaring that in such case it shall survive to the issue; but they have not thought fit to go further." See also to the same point; *Sword v. Adams*, 3 Yeat. R. 34; *Dickinson v. Parvis et al.*, exec's, 8 Serg. & Raw. R. 71. By a subsequent enactment of the same State (Act of 6 May, 1844), it was provided that "No devise or legacy hereafter made in favor of a brother or sister, or the children of a deceased brother or sister of any testator, such testator not leaving any lineal descendants, shall be deemed or held to lapse, or become void by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good or available in favor of such surviving issue, with like effect as if such devisee had survived the testator, saving always to every testator the right to direct otherwise."

his heirs and assigns (*n*), so personal property is assigned to him, his executors, administrators, and assigns. The executor or administrator is, as we shall see, the person who becomes legally entitled to a man's personal estate after his decease; in the same manner that a man's heir or assigns becomes entitled to his real property. But the analogy extends no further. There is no manner of benefit in the use of these terms (*o*) as there is in the employment of the word "heirs." These terms, however, are constantly employed in conveyancing as words of limitation of an absolute interest; and a rule has sprung up with respect to their construction similar to the rule in Shelley's case, by which the word "heirs," when following a life estate given to the ancestor, is merely a word of limitation, giving to such ancestor an estate in fee (*p*). Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators, and assigns, A. will be simply entitled absolutely (*q*); in the same manner as a gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple. But as the *rule, [*207] so far as it applies to personal property, is not founded on the same strict principle as the rule in Shelley's case, a gift of such property to the executors or administrators (not adding assigns) of a person who has taken a previous life interest, may, under peculiar circumstances, be construed as giving him no further interest in such property (*r*); whilst, under the same circumstances, the words "heirs" in a gift of real estate would have given him the fee simple.

As no estates can subsist in personal property, it follows that the rules, on which contingent remainders in freehold lands depend for their existence, have never had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of executory devises and shifting uses. Thus a gift of lands to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years, creates a contingent remainder, which will fail in the event of no son of A. having attained

(*n*) Principles of the Law of Real Property, 115, 2d ed.; 120, 3d ed.

(*o*) Elliot v. Davenport, 1 P. Wms. 84.

(*p*) See Principles of the Law of Real Property, 197, 1st ed.; 207, 2d ed.; 214, 3d ed.

(*q*) Co. Litt. 54, b; Hames v. Hames, 2 Keen, 646; Grafftey v. Humpage, 1 Beav. 46; Howell v. Gayler, 5 Beav. 157; Meryon v. Collett, 8 Beav. 386; Morris v. Howes, 4 Hare, 599.

(*r*) Wallis v. Taylor, 8 Sim. 241; see 1 Beav. 52; Daniel v. Dudley, 1 Phi. 1; Attorney-General v. Malkin, 2 Phi. 64; Mackenzie v. Mackenzie, 3 Mack. & Gord. 559.

the prescribed age at the time of his decease (s). The reason of this failure depends on the ancient rule, that there must always be some defined owner of the feudal possession; and, consequently, between the time of the death of A. and the time of his son's attaining the age of twenty-one years, some owner of the freehold ought to have been appointed, in whom the feudal possession might continue (t). Personal property, however, has evidently nothing to do with these feudal rules relating to possession. If, therefore, a gift be made of personal property to trustees, in trust for A. for his life, *and after his decease, in trust for such son of A. as shall first attain the age [*208] of twenty-one years, or if a term of years be bequeathed to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years; it will be immaterial whether or not the son attain the age of twenty-one years in the lifetime of his father. On his attaining that age, he will become entitled quite independently of his father's interest. His ownership will spring up, as it were, on the given event of his attaining the age. But as the indestructible nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule of perpetuities which confines executory interests within a life or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist (u), applies equally to personal as to real estate. And the further restriction on the accumulation of income imposed by the Thelluson Act (x), applies to trusts for the accumulation of the income of personal estate as well as real.

Equitable interests in personal property of a future kind may be created through the instrumentality of powers, in a similar manner, and to the same extent, as future estates in land (y). Thus stock in the funds may be vested in trustees upon such trusts as B. shall by deed or by his will appoint, and in default of and until any such appointment, in trust for C., or upon any other trusts. Here C. will have a vested interest in the stock, subject to be divested or destroyed by B.'s exercising his power of appointment; and B., though not owner of the stock, has power to dispose of it by deed or will, and

(s) *Festing v. Allen*, 12 Mee. & Wels. 279; * 5 Hare, 573.

(t) *Principles of the Law of Real Property*, 209, 1st ed.; 217, 2d ed.; 224, 3d ed.

(u) *Principles of the Law of Real Property*, 242, 1st ed.; 251, 2d ed.; 259, 3d ed.

(x) Stat. 39 & 40 Geo. III. c. 98; *Principles of the Law of Real Property*, 243, 1st ed., 253, 2d ed.; 260, 3d ed.

(y) See *Principles of the Law of Real Property*, 231, *et seq.* 1st ed.; 236, 2d ed.; 243 3d ed.

[*209] *may if he please appoint to himself; in which case the trustees will be bound to transfer it to him. If the power should not be exercised by B., C. will then be entitled absolutely; and will not, as in the case of landed property, be subject to judgment debts incurred by B. (z), or to any other of his debts. But if B. should exercise his power by deed without valuable consideration, or by will, in favour of a third person, the stock so appointed would be considered in equity as part of the assets of B. the appointor, and would be subject to the demands of his creditors in preference to the claim of the appointee (a). In case of bankruptcy (b) or insolvency (c), it is also provided that all powers vested in the bankrupt or insolvent, which he might legally execute for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees for the benefit of the creditors, in the same manner as the bankrupt or insolvent might have executed the same.

The rules respecting the necessity of a compliance with the terms and formalities of the power, whenever it is exercised otherwise than by will (d), and the relief afforded by the Court of Chancery on the defective exercise of a power (e), apply as well to personal as to real property. Powers over personal estate may also be exercised by women, without their husband's consent, and also in favor of their husbands, in the same manner as powers over land (f); and the [*210] provision of the recent Wills Act, *which requires wills made in exercise of powers to be executed and attested like all other wills (g), applies equally to powers over personal estate. A general bequest of personal estate will also now include any personal estate which the testator may have only a *power* to appoint as he may think fit, in the same manner as a general devise of real estate will comprise real estate subject to any such power (h).

(z) See Principles of the Law of Real Property, 231 et seq., 1st ed.; 236, 2d ed.; 243, 3d ed.

(a) *Lassells v. Cornwallis*, 2 Vern. 465; *Bainton v. Ward*, 2 Atk. 172. The doctrine applies also to appointments of real estate.

(b) Stat. 12 & 13 Vict. c. 106, s. 147, repealing stat. 6 Geo. IV. c. 16, s. 77, to the same effect.

(c) Stat. 1 & 2 Vict. c. 110, s. 49; 7 & 8 Vict. c. 96, s. 11.

(d) See Principles of the Law of Real Property, 232, 1st ed.; 238, 2d ed.; 245, 3d ed.

(e) *Ibid.* 233, 1st ed.; 239, 2d ed.; 246, 3d ed.

(f) *Ibid.* 235, 1st ed.; 241, 2d ed.; 248, 3d ed.

(g) See Principles of the Law of Real Property, 234, 1st ed.; 240, 2d ed.; 247, 3d ed.

(h) *Ibid.* 236, 1st ed.; 242, 2d ed.; 249, 3d ed.

A frequent instance of the employment of a power over personalty occurs in the case of children's portions, which are usually settled on all the children equally, subject to a power given to the parents to appoint the shares in a different manner (1). When such a power is

(1) Whenever a person gives property, and points out with certainty, the objects who are to take, the property itself, and the way in which it shall go, that creates a trust, unless he shows clearly that his desire expressed may be controlled by some person to whom he has given a discretion to defeat it; *Gilbert v. Chapin*, 19 Conn. R. 342; *Hunter v. Stembredge*, 12 Geo. R. 194; *Gibbs v. Marsh*, 3 Metcf. R. 243; *Lucas v. Lockhart*, 10 Smed. & Mar. R. 470; *Erickson v. Willard*, 1 N. H. R. 232; *Jackson v. Jackson*, 2 Barr's R. 212; *Mitchells v. Johnsons, &c.*, 6 Leigh's R. 461. This doctrine is particularly applicable to those cases where a testator has bequeathed or devised property to one, with a "desire," "hope," or "recommendation," that he will appoint it among a certain class, or to such of a designated class, as he shall choose; the words "desire," "hope," "recommend," &c., being considered sufficiently certain, if the objects, and the subject matter of the trust, are clearly indicated; and the discretion reposed by the testator in the donee of the power, being limited to certain individuals of a class, and on no account to be exercised without that limit, is regarded as sufficiently clear to raise a trust; *Gibbs v. Marsh*, 2 Metcf. R. 243; *Lucas v. Lockhart*, 10 Smed. & Mar. R. 470; *Erickson v. Willard*, 1 N. H. R. 232; *Bull v. Bull*, 8 Conn. R. 47; *The New Parish in Exter v. Odwine et al.*, 7 N. H. R. 142; *Dominick v. Sayre*, 3 Sandf. Super. C. R. 555; *Green v. Collins*, 6 Ired. R. 139; *Withers et al v. Yeadon, adm'r*, 1 Rich. Eq. R. 324; *Jarnagin v. Conway et al.*, 2 Humph. R. 50; *Mitchells v. Johnsons, &c.*, 6 Leigh's R. 461. But if the discretion or confidence reposed in the appointor, is such as to allow him to defeat the ultimate desire of the testator, there can be no trust, for one of the certainties incident to every trust is then deficient, by reason of the extreme license vested in the donee of the power; *Harper v. Phelps*, 21 Conn. R. 270; *Lillard v. Robinson*, 3 Litt. R. 415; *Burbank v. Whitney*, 24 Pick. R. 146; *Ellis et al. v. Ellis's adm'r*, 15 Alab. R. 296; in the language of the English cases, the power of appointment must be one, "which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it, or not; and the court adopts the principle as to trusts; and will not permit his negligence, accident or other circumstances, to dis-appoint the interests of those, for whose benefit he is called upon to execute it;" *Brown v. Higgs*, 8 Ves. R. 574; *Pierson v. Garnet*, 2 Brown's Ch. R. 38; *Prevost v. Clarke*, 2 Madd. Ch. R. 458. It is often a matter of considerable difficulty to determine whether a discretion thus granted is sufficient to defeat a trust or not, as will be seen by a comparison of the cases of *Coates' appeal*, 2 Barr's R. 129; *McKonkey's appeal*, 1 Har. R. 253, and *Pennock's Estate*, 8 Id. 268, which, although under different names, are the same case, decided differently three several times; the facts as reported disclose, that a testator bequeathed to his wife the use of his real estate during her life, and his personal property absolutely, "having full confidence that she would leave the surplus to be divided at her decease justly among my children;" by the first of the three cases last cited, it was decided, that this bequest was a trust for the children; by the second, that it was a trust as to the surplus, after the death of the wife; and by the third,

exercised, the shares previously vested in the children are divested from them, and new shares are vested in them by the operation of the

that it was no trust at all. This last is, without doubt, the correct decision, being in accordance with the principles above alluded to; for, to quote from the opinion of Chief Justice GIBSON, in *McKonkey's Appeal*, 1 Harris's R. 258: "It is plain, that she," (the wife of the testator,) "was to use not only the income of the personal estate, but the estate itself, as if she were the untrammelled owner of it;" that is, the discretion reposed by the testator in his wife was so great, as to give her an option to defeat his desire, if she saw fit, and consequently there could be no trust, as was very properly concluded on a third hearing of the case. In the case of *Harrisons v. Harrisons' adm'r*, 2 Gratt. R. 1, however, upon construction of the following words of a will, it was held, that there was an absolute trust for the children, subject to the wife's use:—"In the utmost confidence in my wife, I leave to her all my worldly goods, to sell or keep for distribution among our dear children, as she may think proper. My whole estate, real and personal, are left in fee simple to her; only requesting her to make an equal distribution among our heirs; and desiring her to do for some of our faithful servants, whatever she may think will most conduce to their welfare, without regard to the interest of my heirs." Again, the term used by the testator to designate the class intended to take—among whom the appointor may exercise his discretion—must not be too general, that is, so general as to give rise to an uncertainty, otherwise there will be no trust, and in default of appointment, the property will go to the heir at law, if real estate, or if personal property, to the next of kin, according to the statute of distributions; *Hill's exec's v. Bowman et al.*, 7 Leigh's R. 650; *Shermer v. Shermer's exec's*, 1 Wash. (Va.) R. 266; in other words, the persons who are to take must be a restricted and clearly ascertainable class, and can never be beyond those of

children or relations of the donor or donee of the power; *Mahon v. Savage*, 1 Schoale & Lefroy's R. 111; *Harding v. Glyn*, 1 Atk. R. 469; *Morris v. Owen et al.*, 2 Call's R. 520; *Cole v. Wade*, 16 Ves. R. 27; *Ray v. Adams*, 3 Myl. & K. R. 237; *Doyley v. Att. Gen.*, 4 Vin. Ab. 485; *Witts v. Boddington*, 3 Bro. C. R. 95; *Cathey v. Cathey*, 9 Humph. R. 470; *Hudson v. Hudson's adm'r*, 6 Munf. R. 352; *Dominick v. Sayre*, 3 Sandf. S. R. 555; *Frazier v. Frazier's exec's, et al.*, 2 Leigh's R. 642; *Grant v. Lynam*, 4 Russ. R. 292; thus, the word "family," has been held too general; *Tolson v. Tolson*, 10 Gill & Johns. R. 159; *Cruwys v. Coleman*, 9 Ves. R. 319; *Wright v. Atkins*, 1 Turn. & Russ. R. 157; *Stubbs v. Sargon*, 2 Keen's R. 255; and so of the word "relatives," *Gilbert v. Chapin*, 19 Conn. R. 342; *Dominick v. Sayre*, 3 Sandf. Super. C. R. 555; but on the other hand, "male descendants of the name of Dominick," has been held to designate a class, who would all take equally in default of appointment; *Dominick v. Sayre*, 3 Sandf. Super. C. R. 555; and the words "members of my family," have been regarded as sufficiently certain to create a trust; *Frazier, &c., v. Frazier's exec's, &c.*, 2 Leigh's R. 642.

Where the power is to appoint *among* a certain class, all must have something; *McKonkey's Appeal*, 1 Harris's R. 258; *Grimke v. Exec's of Grimke*, 1 Dessaus. R. 377; *Haynesworth v. Cox*, Harp. Eq. 119, n; *Fronty v. Fronty*, Bail. Eq., App. 517; *Withers et al. v. Yeadon, adm'r*, 1 Rich. Eq. R. 324; *Cathey v. Cathey et al.*, 9 Humph. R. 470; *Knight v. Yarborough*, Gilm. R. 27; *Hudsons v. Hudsons' adm'r*, 6 Munf. R. 352; *Mitchells v. Johnsons, &c.*, 6 Leigh's R. 461; the word *among*, indicates that the discretion is limited to all, and to be exercised only as regards the proportion in which each is to take, which, of course need not be equally; *Withers et al. v. Yeadon, adm'r*, 1 Rich. Eq. R.

power. Formerly, if such a power were so worded as not to authorize an exclusive appointment to some or one of the children, it was held by the Court of Chancery, as a rule of equity, that each child ought to have a substantial share; and an appointment to any child of a very small share was called an *illusory appointment*, and was held void (*i*). But this doctrine having given rise to difficulties and family disputes, from the uncertainty of the question what was too small or what a sufficient share, the meddlesome doctrine of equity on this point was a few years ago abolished by act of parliament (*j*); and now the appointment of any share, however small, cannot be set aside

(*i*) 1 Sugd. Pow. 568 et seq.; 1 Chance on Powers, 396 et seq.

(*j*) Stat. 11 Geo. IV. & 1 Will. IV. c. 46.

324; Knight *v.* Yarborough, Gilm. R. 27; Mitchells *v.* Johnsons, &c., 6 Leigh's R. 461; but no illusory appointment will be valid; Grimke *v.* Exec's of Grimke, 1 Dessaus. R. 377; for that would not be fulfilling the intention of the testator. If, however, the donee of the power, has the power of appointing *to such* of the class as he may see fit, he may appoint to one only, for that is in accordance with the discretion reposed in him; Curr *v.* Crain et al., 2 Eng. R. 241; Ball *v.* Ball, 8 Conn. R. 47; Lasley *v.* Blakeman, 4 B. Mon. R. 540; but in either case, if the appointor does not exercise the power, all of the class will take, for in both instances the testator has indicated the class as the recipients of his bounty, in the one case, granting to a third person the power to divide it among them as he will, in the other, allowing him to give it to one of the class mentioned, if he chooses; Carr *v.* Crain et al., 2 Eng. R. 241; Bull *v.* Bull, 8 Conn. R. 47; Collins *v.* Carlisle, 7 B. Mon. R. 14; Emory et al. *v.* The Judge of Probate, 7 N. H. R. 142; Dominick *v.* Sayre, 3 Sandf. Super. C. R. 555; Green *v.* Collins, 6 Ired. L. R. 139; McKonkey's Appeal, 1 Harris's R. 253; Thomas *v.* Thomas, 1 Raw. R. 118; Withers et al. *v.* Yeadon, adm'r, 1 Rich. Eq. R. 324; Cathey *v.* Cathey et al., 9 Humph. R. 470; Morris *v.* Owen et al., 2 Call's R. 520; and this is in accordance with that principle of law which prescribes, that where there is

a general and a particular intention manifested by the testator, the general intention shall prevail, though the particular intention be defeated: Heirs of Capel *v.* McMillan, adm'r, 8 Port. (Alab.) R. 205; Statesworth *v.* Statesworth, 5 Alab. R. 145.

It has been held, however, in the case of Baker et al. *v.* Lorillard, 4 Comst. R. 257, that where there was a devise to one of property, to dispose of the same among children and grandchildren, it might have been appointed to some in exclusion of the others.

So restricted is this power of appointment to the class specified, that it has been held, that a power to appoint to children will not authorize an appointment to grandchildren; Rankin et al. *v.* Hoyle et al., 6 Ired. Eq. R. 161; Jarnagin *v.* Conway et al., 2 Humph. R. 50; Morris *v.* Owen et al., 2 Call's R. 520; Hudsons *v.* Hudsons' adm'r, 6 Munf. R. 352; Lasley *v.* Blakeman, 4 B Mon. R. 540.

But where there are no children, or there are strong and conclusive circumstances, to show that such was the intention of the testator, grandchildren will take under such a bequest to children; Cutter *v.* Doughty, 23 Wend. R. 522; Ruff *v.* Rutherford et als., 1 Bail. Eq. R. 7; Hallowell et als. *v.* Phipps et als., 2 Whart. R. 376; Dickinson *v.* Lee, 4 Wat. R. 82; Mowatt *v.* Carson et als., 7 Paige's R. 328; Phillips' devisees *v.* Beale, 9 Dana's R. 1.

on the ground of its being illusory. The act extends, as did the doctrine, to real estate as well as personal; but landed property is, from its nature, seldom cut up into little portions.

[*211] *Although no appointment is now void for being illusory, yet where an exclusive appointment is not authorized, any appointment by which any object of the power would be entirely excluded, is still void. Thus, if 1000*l.* be given to A., B. and C. in such shares as their father shall appoint, and in default of appointment to them equally, an appointment of 900*l.* to A. would now be good, as 100*l.* would remain to be equally divided between the three (*k*), of which B. and C. would get each one-third (*l*). But a subsequent appointment of the remaining 100*l.* to B. would be void, as altogether excluding C., who is equally an object of the power (*m*). It is customary, however, in modern settlements to give to parents a power of appointment in favour of any one or more of the children exclusively of the others. And in order that those to whom appointments have been made should not obtain more than may have been intended for them, it is generally provided that no child taking any share of the fund under any appointment shall be entitled to any share in the part unappointed without bringing his or her share into *hotchpot*, and accounting for the same accordingly. Under such a provision, A., in the instance above given, would not be entitled to any share in the 100*l.* unappointed, without also agreeing to a like division of his 900*l.* amongst himself and the others. The clause of *hotchpot* operates favourably to the representatives of those children who may happen to die before any appointment shall have been made to them. For when a power is given to appoint amongst children, no appointment can be made to the executors or administrators of those who may have died (*n*); so that such executors or administrators cannot [*212] possibly take more than the aliquot part given to the deceased child in default of any appointment; whilst they may be partially or totally excluded even from that by a partial or complete exercise of the power of appointment in favor of the surviving children, or even of a single survivor. When the appointment is

(*k*) *Young v. Waterpark*, 13 Sim. 202.

(*l*) *Wilson v. Pigott*, 2 Ves. jun. 351.

(*m*) 2 Ves. jun. 355.

(*n*) *Boyle v. The Bishop of Peterborough*, 1 Ves. jun. 299; *Ricketts v. Loftus*, 4 You. & Coll. 519.

partial only, the executors or administrators of a deceased child will, under the hotchpot clause, divide the fund unappointed with the other children to whom no appointment may have been made; whereas, without such a clause, the children to whom appointments may have been made would be equally entitled to participate in the part unappointed (*o*).

When a power is given to appoint property amongst a particular class, no portion of the fund can be appointed in favor of any person who is not a member of that class; and any appointment to such person will accordingly be void (1). Thus, if the power be to appoint the property to all or any of the *children* of the appointor in such manner as he may think fit, no interest in the property can be appointed to any *grandchild* of the appointor; for a grandchild is not an object of the power (*p*). So if the power be to appoint amongst nephews or grand-nephews, those only can take any shares who answer that description (*q*). Again, if the power be to appoint portions amongst younger children, nothing can be taken by a younger son who afterwards becomes the eldest by the decease of his elder brother (*r*); although if he should have actually received any share in the money *whilst a younger son, he will not be obliged to re- fund it on becoming the eldest (*s*). The word "younger," [*213] however, is not, in the construction of such powers, taken literally, but as meaning any child who may not be entitled to the family estate. Therefore a daughter who may be the eldest child would be considered as a proper object of a power to appoint amongst the younger children, whilst her younger brother, being the eldest son entitled to the family estate, would not be allowed to participate (*t*). And a power to appoint amongst children living at their father's decease includes a child *en ventre sa mere* (*u*).

(*o*) *Wilson v. Pigott*, 2 Ves. jun. 351; *Wombwell v. Hanrott*, 14 Beav. 143.

(*p*) *Alexander v. Alexander*, 2 Ves. sen. 640; *Bristow v. Warde*, 2 Ves. jun. 336.

(*q*) *Falkner v. Butler*, Amb. 514; *Waring v. Lee*, 8 Beav. 247.

(*r*) *Chadwick v. Doleman*, Vern. 528; *Lord Teynham v. Webb*, 2 Ves. sen. 198; *Gray v. Earl of Limerick*, 2 De Gex & Smale, 370.

(*s*) 2 Sug. Pow. 293.

(*t*) *Pierson v. Garnet*, 2 Bro. C. C. 38; *Heneage v. Hunloke*, 2 Atk. 456; *Beale v. Beale*, 1 P. Wms. 244.

(*u*) *Beale v. Beale*, 1 P. Wms. 244.

(1) See ante, p. 210, note.

In some cases where the power only authorizes an appointment amongst children, an appointment in favour of the issue of a child may be sustained as being, in effect, first an appointment to the child, and then an assignment by such child in favor of his issue (*x*). But this of course can only be done when the child is of age, and is a party to and executes the deed by which the appointment is made. And the more regular plan in such cases is, for the father first to make the appointment in favour of the child, and then for the child to make an assignment of the fund appointed, to trustees in trust for his children in the manner intended.

An appointment by a father in favor of his child, in exercise of a power for that purpose, ought to be made for the benefit of the child who is the object of the provision, and not indirectly for the benefit of the father who makes the appointment. Accordingly, any bargain between the father and the child by which the former is to receive any advantage for exercising his power will be considered as, in technical phrase, a fraud on the power, and will render the appointment void (*y*). But when there is no evidence that the appointment is made under a bargain for the benefit of the father, although there may be strong suspicion that such is the case, the appointment cannot be set aside (*z*). Powers of appointment amongst children usually enable the parent to fix the age or time at which the fund appointed shall vest in any child. But, on the principle just stated, a father will not be allowed to make an immediate appointment to an infant child, for the sake of becoming himself entitled to the fund appointed, as the child's personal representative in the event of its decease (*a*). An appointment to an infant is not, however, necessarily void on account of the circumstance that the father, who has made the appointment, will become entitled to the property appointed in the event of the child's decease (*b*).

(*x*) *Routledge v. Dorril*, 2 Ves. jun. 357; *West v. Berney*, 1 Russ. & My. 431, 439; *Goldsmid v. Goldsmid*, 2 Hare, 187.

(*y*) *Daubeney v. Cockburn*, 1 Meriv. 626; *Palmer v. Wheeler*, 2 Ball & Beatty, 18; *Jackson v. Jackson*, 1 Dru. 91; *Thompson v. Simpson*, 2 Jones & Lat. 110.

(*z*) *M'Queen v. Farquhar*, 11 Ves. 467; *Hamilton v. Kirwan*, 2 Jones and Lat. 393; *Campbell v. Home*, 1 You. & Coll. N. C. 664.

(*a*) *Cunynghame v. Thurlow*, 1 Rus. & M. 436; *Lord Sandwich's case*, cited 11 Ves. 479; *Gee v. Gurney*, 2 Coll. 486.

(*b*) *Butcher v. Jackson*, 14 Sim. 444.

In the exercise of powers of appointment amongst children, care should be taken not to postpone the vesting of their shares to a period which may exceed the limits allowed by the law of perpetuity (*c*). When the power of appointment is a general power, enabling the appointor to make a disposition in favour of any object he may please, the property is evidently not tied up so *long as such a power [*215] exists over it; and neither the reason nor the rule which forbids a perpetuity has any application, till some settlement is made in exercise of such a power. In such a case, therefore, the limits of perpetuity commence from the time of the appointment (*d*). But where the power of appointment is to be exercised only in favour of a particular class of objects, the property subject to the power is evidently already tied up in favor of that class. The limits of perpetuity are therefore in this case to be reckoned, not from the time of the exercise of the power, but from the date of its creation. The interests given by the power must, for this purpose, be regarded as if they had been inserted in the settlement by which the power was created; and if such interests would have been too remote if inserted in the original settlement, they will be too remote when given in exercise of the power (*e*). Thus a person having a general power of appointment by will over a fund, may by his will appoint a share of it in favour of any unborn child of his own, to be vested in such child on his attaining the age of twenty-three years. The limit of perpetuities is reckoned from the time of the appointment, which in this case is the death of the appointor, when his will begins to take effect. The child must necessarily then be born, or in *ventre sa mere*, and the child's life is accordingly the life then in being within which the share must necessarily vest. But if by a marriage settlement a fund be settled in trust for the father for his life, and after his decease in trust for the children, in such shares as he shall appoint by his will, he cannot make an appointment in favour of any unborn child, to be vested on his attaining the age of twenty-three years. For in this case the limit of perpetuities counts from the date of the settlement, when the property was first tied up for the benefit of the children; and this limit would *be exceeded if the child should not [*216] attain the given age within twenty-one years after the decease

(*c*) See ante, p. 208.

(*d*) 1 Sug. Pow. 249, 495.

(*e*) Co. Litt. 271 b, n. (1), vii. 2; 1 Sug. Pow. 498; *Routledge v. Dorril*, 2 Ves. jun. 357.

of the father, who was the life in being at the date of the settlement. And the rule is that every limitation which *may* exceed in duration a life or lives in being, and twenty-one years afterwards (allowing for the period of actual gestation,) is void as tending to a perpetuity (*f*).

When personal property is directed to be paid to any persons at a future time, the leaning of the courts is always in favor of vested interests; that is to say, the courts lean to that construction which will give to the parties a present assignable and transmissible right to that which is not payable till a future time (1). Thus if a legacy be given to a person to be payable when he attains the age of twenty-one years, the legacy is considered to be immediately vested, and will accordingly be payable to the administrator of the legatee in case he should die under age (*g*). So if personal estate be settled in trust for

(*f*) See Principles of the Law of Real Property, 242, 1st ed.; 251, 2d ed.; 259, 3d ed.

(*g*) 2 Black. Comm. 513; Co. Litt. 237 a, note (1).

(1) The fundamental rule, that the intention of the testator is to govern the construction of a will, is the primary test to discover whether a legacy is vested or contingent; *Chighizola v. Le Baron*, exec., 21 Alab. R. 406; *Marr, exec. v. McCullough*, adm'r, 6 Port. (Alab.) R. 507; *Stone et al. adm'rs v. Massy*, 2 Yeates R. 363; *Scott, exec. v. Price*, exec., 2 Serg. & Raw. R. 59; *Lemonier v. Godfroid*, 6 Har. & Johns. R. 474. It is often, however, a matter of great difficulty, to decide whether, from the intention of the testator, it was designed that a legacy should be vested or contingent; *Shattuck, adm'r v. Stedman et al.*, exec's. 2 Pick. R. 468.

The legal construction of wills favours the vesting of legacies; *Johnson v. Valentine*, 4 Sandf. Super. C. R. 36; *Reed v. Buckley*, 5 Wat. & Serg. R. 517; *Roberts' exec's v. Brinker*, 4 Dana's R. 72, *Cowdin v. Perry et al.*, exec's, 11 Pick. R. 503; *The State v. Mann*, 3 Har. & Johns. R. 338. Thus, words of survivorship are always to be referred to the period of the testator's death, unless there is a plain intent to the contrary; *Moore v. Lyons*, 25 Wend. R. 119; *Hulburt v. Ericson et al.*,

16 Mass. R. 241; *Drayton v. Drayton et als.*, 1 Dessauss. R. 325; *Elliott v. Exec's of Smith*, Ibid.; *Sealy v. Laurens*, Ibid.

Where time is annexed to the payment only, and not to the gift itself, the legacy is vested; *Chighizola v. Le Baron*, exec., 21 Alaba. R. 406; *Seiberts' Appeal*, 1 Har. R. 501; *Moore v. Smith*, 9 Wat. R. 403; *Lamb v. Lamb*, 8 Id. 184; *Bayard v. Atkins*, 10 Barr's R. 17; *Schrivier v. Cobean*, 4 Wat. R. 130; *Patterson, surviving exec. v. Hawthorne*, adm'r, 12 Serg. & Raw. R. 112; *Magoffin, adm'r v. Patton et als.*, exec's, 4 Raw. R. 113; *Jackson's adm'r v. Subett*, 10 B. Mon. R. 572; *Furness, exec. v. Fox*, 1 Cush. R. 134; *Ware v. Cook*, 1 Halst. Ch. R. 193; *Marr, exec. v. McCullough*, adm'r, 6 Port. R. 507; *Patterson v. Ellis*, 11 Wend. R. 269; *Donner's Appeal*, 2 Wat. & Serg. R. 372; *Roberts' exec's v. Brinker*, 4 Dana's R. 572; *Gregg et al. v. Bethea*, 6 Port. (Alab.) R. 9; *Goddard v. Johnson*, exec., 14 Pick. R. 352; *Lemonier v. Godfroid*, 6 Har. & Johns. R. 474; *Boone v. Sinkler*, 1 Bay's R. 369; *Carpenter v. Heard*, 14 Pick. R. 449; and in like manner, when the division, merely, of the property is postponed to a future time, and not its distri-

A. for life, and after his decease for all his children in equal shares, each of his children will be entitled to a share, whether such child survive his parent or not, and although such child should die in infancy (*h*). If, however, the property should consist of money charged on land or other real estate, such as the portions of younger children when the family estate is entailed on the eldest son, the rule is different; and if any of the children should die before the time when his or her portion becomes payable, it will, in the absence of special provision to the contrary, sink into the land for the benefit of the estate (*i*).

*In the settlement of personal property upon children there are two plans, either of which may be adopted with respect to the vesting of the interests given. The one plan is, to vest the interests of the children in them immediately as they come into being, divesting from each of them proportionate shares as others are born, and also divesting the shares altogether in favour of the others, in the event of the decease of any son under age, or of any daughter under age and without having been married. The other plan is, to vest the interests given only in those who, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry under it. So far as the corpus of the fund is concerned, the result of each of these plans is the same, the property being ultimately divided only amongst those children who, being sons, live to come of age, or, being daughters,

(*h*) *Skey v. Barnes*, 3 Mer. 335; *Templeton v. Warrington*, 13 Sim. 267.

(*i*) Co. Litt. 237 a, n (1). See *Evans v. Scott*, 1 H. of L. Cases, 43, 57.

bution, the legacy is considered vested; *Spruill v. Moore*, 5 Ired. Eq. R. 287; *Womack v. Greenwood*, 6 Geo. R. 299; *Smith v. Wiseman*, 6 Ired. Eq. R. 540; *McLemore v. McLemore*, 8 Alab. R. 687; *Christian v. Christian*, 3 Port. (Alab.) R. 351; *Etheridge, adm'r, v. Bell*, 5 Ired. L. R. 87; *Candler v. Dinkle*, 4 Wat. R. 143; *Fanty v. Kline*, *Penning*. R. 551.

If something out of the principal is to be immediately paid to the legatee, or appropriated in his favour, the legacy will be vested; as the giving of interest on the principal sum until the time of payment arrives; *Schrivver v. Cobeau*, 4 Wat. R. 130; *Heleman v. Heleman et als.*, 4 Raw. R. 440; *King v. King*, 1 Wat. & Serg. R. 205; *Marr,*

exec. v. McCullough, adm'r, 6 Port. R. 507; *Patterson v. Ellis*, 11 Wend. R. 269; *Hopkins v. Jones*, 2 Barr's R. 69; *Kelso v. Dickey*, 7 Wat. & Serg. R. 279; *Lemonier v. Godfroid*, 6 Har. & Johns. R. 474; *Boone v. Sinkler, exec.* 1 Bay's R. 369; *Cassilly et al. v. Meyer et el.*, 4 Md. R. 1.

When there is a gift to a class of persons to take effect in enjoyment at a future period, the property vests in the persons as they come *in esse*, subject to be opened and let in others, as they may be born afterwards; *Johnson v. Valentine*, 4 Sandf. Super. C. R. 36; *Barnes et al. v. Prevost et als.*, 4 Johns. R. 61; and see also, *Hal Eddy*, 2 Green's R. 169.

come of age or previously marry. But with regard to the income of the fund the plans are different. In the first case, the income belongs to the children whilst under age; but in the second no interest either in the income or in the principal is given during minority, or, in the case of daughters, until marriage under age. In the first case, therefore, if the father be dead, the income will be payable to the guardian of the children toward their maintenance and education; but in the second case there will be no provision for these purposes in the absence of express directions. Such directions therefore should in such case be always inserted, with a provision for the accumulation of the surplus income by way of increase of the principal. If however the whole property is ultimately to go amongst the children (*k*), or if the persons entitled, in the event of the children not living to attain vested interests, should agree (*l*), the Court of Chancery will direct the [*218] *income to be applied for the children's maintenance, in the absence of sufficient provision for that purpose, and even in the face of an express direction to accumulate the income (*m*).

In marriage settlements a life interest is usually and properly given to the father and mother, so that no provision is required for the maintenance of the children until after the decease of the survivor. And where life interests are not given to the parents, but provision is made for the maintenance of the children during the father's lifetime out of the settled fund, such provision is considered as primarily applicable for the maintenance of the children accordingly (*n*). But the general rule is, that every father is bound to maintain his children, if of ability so to do (*o*); and a provision contained in a gift to an infant child, for his maintenance and education, will not be allowed to be applied for that purpose during his father's lifetime, if the father is able to maintain him in a manner suitable to his condition and prospects (*p*)(1). When, therefore, it is intended that the income of

(*k*) *Haley v. Bannister*, 4 Mad. 275; *Errat v. Barlow*, 14 Ves. 202.

(*l*) *Turner v. Turner*, 4 Sim. 430; *Cannings v. Flower*, 7 Sim. 523.

(*m*) *Greenwell v. Greenwell*, 5 Ves. 194.

(*n*) *Stocken v. Stocken*, 4 Sim. 152; *Meacher v. Younge*, 2 Myl. & K. 490. See *Thompson v. Griffin*, 1 Craig and Phillips, 317.

(*o*) *Andrews v. Partington*, 3 Bro. C. C. 60.

(*p*) *Maberley v. Turton*, 14 Ves. 499; *Jervoise v. Silk*, G. Cooper, 52; *Ex parte Williams*, 2 Collier, 740.

(1) A father will not be allowed for the support them; In the matter of *Kane et al.*, 2 Barb. Ch. R. 375; *Walker et al. v. Prowder et al.*, 2 Ired. Eq. R. 478; *Whil-*
 maintenance and education of his children, al., 2 Barb. Ch. R. 375; *Walker et al. v.*
 ut of their fortunes, if he is of ability to *Prowder et al.*, 2 Ired. Eq. R. 478; *Whil-*

property given to children should be applied to their maintenance during their father's lifetime, without reference to his ability to maintain them, the application of the income, without reference to his ability, should be expressly authorized; and, if such application be authorized, the income may of course be applied accordingly (*q*). When two funds are provided for the maintenance of an infant, it is frequently difficult to decide to which fund recourse should be first had (1). The general rule is, that *the interest of the infant [*219] determines the order of application (*r*); but in order to avoid questions, it is very desirable, when two funds are provided for an infant's maintenance, to direct that one of them shall be in aid only of the provision afforded by the other.

In settlements of personal property, it is usual to provide for the

(*q*) See *Wetherell v. Wilson*, 1 Keen, 80.

(*r*) *Foljambe v. Willoughby*, 2 Sim. & Stu. 165; *Lygon v. Lord Coventry*, 14 Sim. 41.

den et al. v. Whilden, exec. et al., *Riley's Ch. Cas.* 205; *Addison v. Bowie*, 2 *Bland's Ch. R.* 606; In the matter of *Bostwick*, 4 *Johns. Ch. R.* 100; *Jones v. Stockett*, 2 *Bland's Ch. R.* 431; *Cruger v. Haywood*, 2 *Dessauss. R.* 94; In the matter of *Harland's Accounts*, 5 *Raw. R.* 323; *Dawes v. Howard et al.*, 4 *Mass. R.* 97; *Guion v. Guion's adm'r*, 16 *Misso. R.* 52; *Sparhawk et als. v. Adm'r of Buell et als.*, 9 *Vt. R.* 70; but the fathers' situation in life, the future prospects of the children, the extent of their fortune, and all other circumstances, must be taken into consideration in determining the ability of the father; In the matter of *Kane et al.*, 2 *Barb. Ch. R.* 375; *Walker et al. v. Crowder et al.*, 2 *Ired. Eq. R.* 478; *Ellerbe v. The Heirs, &c., of Ellerbe*, 1 *Speer's Eq. R.* 328.

The case is, of course, different where the father is not of ability; *Myers v. Myers*, 2 *McCord's Ch. R.* 255; *Dawes v. Howard et al.*, 4 *Mass. R.* 97; *Newport et al. v. Cook et al.*, 2 *Ash. R.* 332; and it seems, that a mother will be allowed for the support of her children, out of their estates, notwithstanding she may be of ability to maintain them; *Wilkes v. Rogers*

et als., 6 *Johns. R.* 566; *Whipple v. Dow*, 2 *Mass. R.* 415; *Dawes v. Howard et al.*, 4 *Id.* 97; *Guion v. Guion's adm'r*, 16 *Misso. R.* 52; *Osborne v. Van Horn et al.*, 2 *Florida R.* 360. But where a mother has maintained a child, she will not be allowed to recover what she has expended, upon an implied promise of the child to refund, for the law will presume that she has furnished her means gratuitously; *Cummings v. Cummings*, 8 *Wat. R.* 366.

In all cases, however, the court will consult the permanent interests of the children; In the matter of *Burke*, 4 *Sandf. Ch. R.* 617; and will make exceptions to ordinary rules of law in their favour, as has been done by allowing interest upon legacies left to children, from the time of the death of the testator, where there was no other means of support; *Sullivan v. Winthrop et als.*, 1 *Sumn. R.* 1; *Miles v. Wister*, 5 *Bin. R.* 479; *Lupton et al. v. Lupton et als.*, 2 *Johns. Ch. R.* 614.

(1) Where a fund has been appropriated to the maintenance and education of children, it must be completely exhausted before a further allowance will be made by the court; In the matter of *Davison et als.*, 5 *Paige's Ch. R.* 186.

investment of the funds settled in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England or Wales, but not in Ireland. Government securities, as distinguished from stocks or funds, seem to be nothing else than Exchequer bills, in which trustees appear to be justified, even without express authority, in investing the property for any temporary purpose, as during the necessary delay in completing a contemplated mortgage security (*s*). But where a permanent investment is intended, a trust to lay out money in government securities will not authorize the purchase of Exchequer bills (*t*). Real security means the mortgage of real estate, namely, freehold or copyhold hereditaments of sufficient value (*u*). And if it be desired that the trustees should have power to invest the trust money on mortgage of leasehold estates, or in railway debentures, or shares, or any other securities, or to lend it to any party on his bond, express authority ought to be given to the trustees for the purpose. Investments in Ireland are generally expressly prohibited, on account of a recent act of parliament, which empowers trustees, who are authorized by their trust to [*220] lend money at *interest on real securities in England, Wales, or Great Britain, to lend the same at interest on real securities in Ireland (*v*). But all loans of money on real securities in Ireland under the act, in which any minor or unborn child, or person of unsound mind, may be interested, must be made by the direction and under the authority of the Court of Chancery in England, to be obtained in any cause or upon petition in a summary way (*x*); and every such loan must be made with the consent of the person or persons, if any, whose consent may be required as to the investment of such money upon real securities in England, Wales, or Great Britain, testified in the manner required by the trust (*y*). And it is also provided that the act shall not apply to cases where there is an express restriction against the investment of the trust money on securities in Ireland (*z*).

(*s*) *Matthews v. Brise*, 6 Beav. 239, 244.

(*t*) *Ex parte Chaplin*, 3 You. & Coll. 397.

(*u*) See *Stickney v. Sewell*, 1 My. & Cr. 8; *Phillipson v. Gatty*, 7 Hare, 516. Turnpike bonds are real securities for some purposes; *Robinson v. Robinson*, Lords Justices, 1 De Gex, Mac. & Gord. 247 262.

(*v*) Stat. 4 & 5 Will. IV. c. 29.

(*x*) Sect. 2. *Ex parte French*, 7 Sim. 502; *Ex parte Lord William Pawlett*, 1 Phill. 570; *Morris v. Wright*, 14 Beav. 291.

(*y*) Sect. 4.

(*z*) Sect. 5.

The consent of the persons for the time being entitled to the income of the property is generally required in settlements, to any change of investment which the trustees may be authorized to make; and this consent is sometimes required to be in writing, and occasionally to be testified by deed. Where consent is required, it must be given previously to or at the time of the change of investment (*a*); for as the consent is required as a check upon the trustees, a subsequent consent, when the mischief may be done, is evidently unavailing. The person whose consent is required is not, however, the sole judge of the propriety of any change of investment; the trustee, by virtue of his office, has also a discretion; and if he should consider the investment ineligible, he may refuse to make it, although requested so to do by *the person whose consent ought to be obtained (*b*). But the terms of the instrument may require the trustees to change the investments at the request of any given person; and in this case they will generally be bound to act accordingly, unless the circumstances of the case should be such as were evidently not contemplated when the settlement was made (*c*). [221]

In settlements of personal property, authority is sometimes given to the trustees to make investments in the purchase of landed estates. As land devolves in a different manner from personal property, it is obvious that a simple change of the property from personalty to land would in many cases materially disarrange the destination of the property. Thus if a person entitled under the settlement to a reversionary interest in the settled fund should have died intestate, his administrator would be entitled to such interest so long as the property continued to be personal, but, on its being changed into real estate, it would shift to his heir at law. In order to obviate this inconvenience, it is so contrived that the lands to be purchased should, from the moment the purchase is made, be considered as personal property (1).

(*a*) *Bateman v. Davis*, 3 Madd. 98; *Greenham v. Gibbeson*, 10 Bing. 363.*

(*b*) *Lee v. Young*, 2 You. & Coll. N. C. 532.

(*c*) *Boss v. Godsall*, 1 You. & Coll. N. C. 617.

(1) It is a well established rule of equity, *Craig v. Leslie*, 3 Wheat. R. 377; *Peter et al. v. Beverly et als.*, 10 Pet. R. 534; *Hawley et al. v. James et als.*, 5 Paige's Ch. R. 318; *Smith et als. v. McCrary et al.*, 3 Ired. Eq. R. 204; *Golt et als. execs. v. Cook et als.*, 7 Paige's Ch.

To effect this object, the lands when purchased are directed to be held by the trustees upon trust to sell them, with the consent of the equitable tenants for life, during their lives, and after their decease at the discretion of the trustees (*d*). This trust for sale converts the

(*d*) See Appendix B.

R. 521; *Kane v. Golt et als.*, *Ibid.*, S. C., 24 Wend. R. 641; *The Commonwealth v. Martin's execs.*, &c., 5 Munf. R. 121; *Pratt v. Taliaferro*, 3 Leigh's R. 419; *Siter et als. v. McClanchan et als.*, 2 Gratt. R. 280; *Reading v. Blackwell*, 1 Baldw. R. 166; *Fairly v. Kline*, Penning. R. 551; *Hurlt v. Fisher*, 1 Har. & Gill's R. 88; *Leadenham's exec. v. Nicholson et al.*, *Id.* 267; *Morrow v. Brenizer*, 2 Raw. R. 185; *Burr v. Sim et als.*, 1 Wh. R. 252; *Allison exec. v. Wilson's exec's*, 13 Serg. & Raw. R. 332; *Price v. Watkins*, 1 Dal. R. 8; *Rice v. Bixler*, 1 Wat. & Serg. R. 445; *Willing v. Peters*, 7 Barr's R. 287; *Lorillard et als. v. Coster et als.*, 5 Paige's Ch. R. 172; *Drake v. Pell*, 3 Edwd. Ch. R. 267; *Rinehart v. Harrison's execs.*, 1 Baldw. R. 177; *Marsh v. Wheeler*, 2 Edwd. Ch. R. 160; *Tazewell et al. v. Smith, adm'r*, 1 Rand. R. 313. And this rule will operate, even though the sale or purchase is not to be made until a future time, provided there is no contingency, upon the happening or not happening of which, the intended conversion will be defeated; *Reading v. Blackwell*, 1 Baldw. R. 166; *Fairly v. Kline*, Penning. R. 551; *Price v. Watkins*, 1 Dal. R. 8; *Rinehart v. Harrison's exec's*, 1 Baldw. R. 177. But where the intended transformation is to be effected upon a contingency, there will be no conversion until that contingency has happened; *Evans v. Kingsberry*, 2 Rand. R. 120; *Storer v. Zimmerman*, 9 Harris's R. 324; *Clay et al. v. Hart*, 7 Dana's R. 11; *Nagle's Appeal*, 1 Harris's R. 260; *Bleight v. Manufac. & Mechan. Bank*, 10 Barr's R. 132; *Wright v. The Trustees of the M. E. Church*, 1 Hoff. R. 213; *Henry v. McCloskey*, 9 Wat. R. 142.

Where land is directed to be sold for a

particular purpose, and is sold accordingly, and there is a balance of money after the accomplishment of the purpose for which the sale was made, that money will be considered as land, unless the testator, donor, or other person by whose direction the conversion was made, has clearly shown that it was his wish that the character of personality should be stamped upon the whole property; and this rule applies equally, where a part of a fund is sufficient to accomplish a purpose to be attained through the purchase of land; *Craig v. Leslie*, 3 Wheat. R. 577; *Hawley et al. v. James et als.*, 5 Paige's Ch. R. 318; *Smith et als. v. McCrary et al.*, 3 Ired. Eq. R. 204; *The Commonwealth v. Martin's exec's*, 5 Munf. R. 121; by this last case, it seems, that the conversion will not be enforced, if it should operate injuriously upon the beneficiary, for to quote the words of Judge Coulter, "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. * * * It is also, an established principle, that, if a party having such fund dies, it will go to his real or personal representatives, as money or land, according as he himself would have taken it; but this rule of considering money as land, or land as money, will not apply if the special purpose for which the conversion is to be made fail; *neither does it apply, if the effect would operate an escheat.*"

Where by equitable conversion money is considered as land, it cannot in any case retain its inheritable quality as real estate, further than the first descent; *Dyer v. Cornell*, 4 Barr's R. 361; and the converse of this is also the law.

lands into money in the contemplation of equity; for it is a rule of equity, that whatever is agreed to be done shall be considered as done already. In the words of Sir Thomas Sewell (*e*), "Nothing is better established than this *principle, that money directed to be employed in the purchase of land, and land directed to be sold [222] and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." And if land is clearly directed to be sold, the circumstance that the consent of some person or persons is required to the sale will not prevent the immediate conversion of the land into money in the contemplation of equity, although such a circumstance may often cause a long postponement of the period of its actual conversion (*f*). Notwithstanding a trust for the sale of land, if all the parties interested should be of full age (*g*), and if females unmarried (*h*), they may elect that the land shall not be sold; and after such election the land will be considered as real estate in equity as well as at law (*i*). And the election of the parties need not be expressed in so many words, but may be inferred from any acts by which their intention is clearly shown (*j*)(1).

(*e*) In *Fletcher v. Ashburner*, 1 Bro. C. C. 499, approved by Lord Alvanley in *Wheldale v. Partridge*, 5 Ves. 396, 397. See also *Griffith v. Ricketts*, 7 Hare, 299.

(*f*) See *Lechmere v. Earl of Carlisle*, 3 P. Wms. 218, 219.

(*g*) *Van v. Barnett*, 19 Ves. 102.

(*h*) *Oldham v. Hughes*, 2 Atk. 452.

(*i*) *Davies v. Ashford*, 15 Sim. 42.

(*j*) *Lingen v. Sowray*, 1 P. Wms. 172; *Cookson v. Reay*, 5 Beav. 22; 12 Cl. & Fin. 121.

(1) In all cases where there would be an equitable conversion of land into money, or money into land, the person for whose use the property is given, may elect to receive it as money or land according to his option: *The Commonwealth v. Martin's exec's*, 5 Munf. R. 121; *Burr v. Sim et als.*, 1 Wh. R. 252; *Smith v. Starr*, 3 Id. 65; *Rice v. Bixler*, 1 Wat. & Serg. R. 445; *Willing v. Peters*, 7 Barr's R. 287; *Tazewell et al. v. Smith, adm'r*, 1 Rand. R. 318; but in order to make this election, he must be entitled to the whole estate or fund; *Craig v. Leslie*, 3 Wheat. R. 577; *Rinehart v. Harrison's exec's*, 1 Baldw. R. 177; and where there is more than one distributee, they must all agree in determining the character of the property, for the election of one alone is not sufficient; *Willing v. Peters*, 7 Barr's R. 287; *Rinehart v. Harrison's exec's*, 1 Baldw. R. 177, in which last case, it is also decided, that election can only be made by the person or persons first entitled.

All properly drawn settlements of personal estate contain a power for the trustees or trustee for the time being, acting in the execution of the trusts, to give receipts for any money payable to them or him under the trusts, which receipts, it is declared, shall effectually discharge the persons paying the money from all responsibility as [*223] *to its application. The necessity of this provision arises from a rule of equity, by which any person who pays money to another, whom he knows to be merely a trustee, is bound to see the money applied according to the trusts (*k*). If, however, the trusts should be of such a kind as to require time and discretion to carry them into effect, the receipt of the trustees will, from the nature of the case, be an effectual discharge, without an express clause for this purpose (*l*)(1).

Every settlement, the trusts of which are likely to be of long duration, should contain a power of appointing new trustees in the event

(*k*) *Spalding v. Shalmer*, 1 Vern. 301; *Lloyd v. Baldwin*, 1 Ves. sen. 173.

(*l*) *Doran v. Wiltshire*, 3 Swanst. 699; *Balfour v. Welland*, 16 Ves. 151.

(1) Where trust property has been sold, and the purchase money is to be re-invested upon trusts which require time and discretion, or the acts of sale and re-investment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase-money; *Wormley et als. v. Wormley et als.*, 8 Wheat. R. 421; *Lining v. Peters et als.*, 2 Desauss. R. 375; *Hauser et al. v. Shore et al.*, 5 Ired. Eq. R. 357; nor is he so bound, where, in accordance with a power for that purpose, lands are sold for the payment of debts generally; *Hannum et al. v. Spear*, 2 Dal. R. 291, S. C., 1 Yeates' R. 553; *Hauser et al. v. Shore et al.*, 5 Ired. Eq. R. 357; though it is otherwise of debts scheduled or specified, *Grant v. Hook*, 13 Serg. & Raw. R. 262; and so, where trust property has been sold for the purpose of distribution among the owners, the purchaser has been held not liable for the misapplication of the proceeds; *Hunt et al. v. The State Bank et al.*, 2 Dev. Eq. R. 60.

The proper mode of discovering whether the purchaser of property held in trust, is to look to the application of the purchase

money, is, to ascertain whether the trust is for general or specific purposes; if the former, the purchaser is not bound; thus, in *Grant v. Hook*, 13 Serg. & Raw. R. 262, Judge Duncan says, "Where the trust is for the payment of debts generally, the purchaser is not bound to see to the application of the purchase money, although he has notice of the debts. For a purchaser cannot be expected to see to the observance of a trust so unlimited and undefined. But, if the trust be of such a nature, that the purchaser can reasonably be expected to see to the application of the purchase money, as if it be for the payment of legacies, which are scheduled or specified, he is bound to see that the money is applied accordingly." See also, *Dalzell v. Crawford*, 2 Pa.* L. Jour. 23, S. C., 1 Pars. Eq. Cas. 37; *Cadbury v. Duval*, 10 Barr's R. 267. "In all cases * * * where the objects are not so defined as to be brought at once to the view of the purchaser, it is settled that he is not affected by them, and has only to pay the purchase money." *Garrett v. Macon et al.*, 2 Brockenb. R. 234.

of any trustee dying, going to reside beyond the seas, desiring to be discharged, refusing, or becoming incapable to act in the execution of the trusts (*m*)(1). And as the mere appointment of a trustee will not be sufficient to vest the trust property in him, it is usual and proper to direct that, on every such appointment, the trust property shall be so conveyed, assigned, transferred, or paid as effectually to vest the same in the new trustee jointly with the surviving or continuing trustee, or solely as the case may require. Every new trustee should also be invested with the same powers as the original trustees. A mere power to appoint a new trustee does not, however, render such appointment imperative; and in case of the death of any trustee, the survivors or survivor may still carry on the ordinary business of the trust (*n*). When a trustee has once accepted the office, he has no right to retire, unless the person having the power to appoint another trustee in the event of his retiring, should consent to do so (*o*); or *unless from unforeseen circumstances, the duties of the trust should have become more onerous than was contemplated by [224] the trustee when he accepted the office (*p*).

The Trustee Act, 1850 (*q*), the provisions of which have been extended by a more recent act (*r*), empowers the Court of Chancery to appoint a new trustee in all cases where it is inexpedient, difficult, or impracticable so to do, without the assistance of that court, and either in substitution for, or in addition to, any existing trustee (*s*),

(*m*) See Appendix B.

(*n*) Warburton v. Sandys, 14 Sim. 622.

(*o*) Adams v. Paynter, 1 Coll. 532.

(*p*) Coventry v. Coventry, 1 Keen, 758.

(*q*) Stat. 13 & 14 Vict. c. 60. See Principles of the Law of Real Property, p. 142, 3d ed.

(*r*) Stat. 15 & 16 Vict. c. 55.

(*s*) Stat. 13 & 14 Vict. c. 56, ss. 32, 35.

See also, Hill on Trustees, 2d Am. ed., (1843,) 581; Revis. Stats. of Mass. (1836,) p. 342, n. (1). 444; Revis. Stats. of Maine, (1846,) 466;

(1) For the American Statute Law on Elmer's Dig. Ls. of N. J., 600; Revis. the subject of the appointment of trustees, Stats. of N. C., (1836-7,) pp. 387, 388; in the place of others dying, resigning, &c., Stats. of S. C., (1786 to 1814,) Vol. V., see N. H. Compiled Stats. (1853,) 426; 2 pp. 277, 278; Caruther's & Nicholson's Revis. Stats. of N. Y. (3d ed.) pp. 15, 16; Stat. Ls. of Tenn., 693; Stats. of O., Code of Va. (1849,) pp. 675, 676; Revis. (1841,) pp. 1001, 1002; Stroud & Bright-Stats. of Vt. (1839,) 300; Michi. Revis. ly's Purd. Dig., (1700-1853,) pp. 804, 806, Stats. 301; Dorsey's Ls. of Md., Vol. I., 807, 808. pp. 210, 212, 644, 646; Clay's Ala. Dig.

and whether there be any existing trustee or not (*t*). Provision is also made for the appointment of a new trustee in lieu of any trustee who may have been convicted of felony (*u*), and for the infancy (*x*), lunacy or idiocy of any trustee or executor (*y*), and for his being out of the jurisdiction of the court, or not being found, and for its being uncertain whether he is living or dead (*z*), and for his neglecting or refusing to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action (*a*)(1).

The office of trustee of a settlement is one involving great responsibility, and frequently much trouble, without any remuneration; for a trustee is not allowed to make a profit of his trust. And if he be a solicitor, he cannot receive payment for his professional trouble [*225] incurred in the business of the trust (*b*), unless he *expressly stipulate before accepting the office, that he shall be permitted to do so (*c*), or unless his charges be voluntarily paid by the cestui que trust with full knowledge that they might have been resisted (*d*). But a trustee may charge against the trust property all costs and expenses properly incurred in the conduct of the trust. And in the event of a suit being brought against the trustees, one of the trustees, being a solicitor, may be employed by his co-trustees, and may make the usual charges against them, provided the amount of the costs be not thereby increased (*e*)(2). And every trustee is allowed in a suit his full costs, as between solicitor and client (*f*). But his right to costs may be forfeited by his negligence or misconduct (*g*): or he may even be

(*t*) Stat. 15 & 16 Vict. c. 55, s. 9.

(*u*) Ibid. sect. 8.

(*x*) Sect. 3.

(*y*) Stat. 13 & 14 Vict. c. 60, ss. 5, 6; 15 & 16 Vict. c. 55, ss. 10, 11.

(*z*) Stat. 13 & 14 Vict. c. 60, ss. 22, 25.

(*a*) Ibid. ss. 23, 24, 25; stat. 15 & 16 Vict. c. 55, ss. 4, 5.

(*b*) *Moore v. Frowd*, 3 My. & Craig. 45; *Fraser v. Palmer*, 4 You. & Coll. 515; *Collins v. Carey*, 2 Beav. 128; *Bainbrigg v. Blair*, 8 Beav. 588; *Todd v. Wilson*, 9 Beav. 486. See *Ex parte Newton*, 3 De Gex & S. 584.

(*c*) *Re Sherwood*, 3 Beav. 388.

(*d*) *Stanes v. Parker*, 9 Beav. 385. See *Gomley v. Wood*, 3 Jones & Lat. 678.

(*e*) *Craddock v. Piper*, 1 Mac. & Gord. 664. See *Lincoln v Windsor*, 9 Hare, 158.

(*f*) 2 Fonb. Eq. 176.

(*g*) *Campbell v. Campbell*, 2 My. & Craig, 25; *Howard v. Rhodes*, 1 Keen, 581.

(1) See ante, p. 223, note.

Messrs. Hare and Wallace, the whole sub-

(2) See the case of *Robinson v. Pelt*, 71 subject of the compensation of trustees is Law Library, 182, where in a note by considered.

made to pay the costs of the other parties (*h*). As the trustee has the legal title to the property, he is often enabled, if fraudulently inclined, to sell it or spend it for his own benefit. It is therefore highly proper that his conduct should be narrowly scrutinized, and that he should be invariably punished for any breach of faith. But the Court of Chancery goes further than this, and punishes, with almost equal severity, his neglect of duties, which in many cases he scarcely knows that he has undertaken. Thus, if a trustee, by his negligence or misplaced confidence in his co-trustee, gives him an opportunity to commit a breach of trust, of which opportunity the co-trustee avails himself, the innocent trustee will be made to replace the whole of the fund abstracted *by the other (*i*). So if the trustee should depart from the letter of his trust, as by in- [*226] vesting the trust fund on an unauthorized security, although at the importunity of some of the parties interested, and with a bonâ fide desire to benefit them all, he will be answerable for any loss which such departure may have occasioned (*k*). And if, being ignorant of law, he should give himself up entirely to his professional adviser, he may still suffer from the mistake of his solicitor or conveyancer (*l*); and in such case he will scarcely perhaps see the justice of the remark that he might (had he known how) have chosen a wiser solicitor, or a more learned counsel (*m*)(1). In all ordinary settlements, clauses are

(*h*) *Wilson v. Wilson*, 2 Keen, 249; *Willis v. Hiscox*, 4 My. & Craig, 197; *Firmin v. Pulham*, 2 De Gex & Smale, 99.

(*i*) *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; *Brice v. Stokes*, 11 Ves. 319; *Hanbury v. Kirkland*, 3 Sim. 265; *Booth v. Booth*, 1 Beav. 125; *Broadhurst v. Balguy*, 1 You. & Coll. N. C. 16; *Styles v. Guy*, 1 Mac. & Gord. 422.

(*k*) *Driver v. Scott*, 4 Russ. 195; *Pride v. Fooks*, 2 Beav. 430; *Forrest v. Elwes*, 4 Ves. 497; *Watts v. Girdlestone*, 6 Beav. 188.

(*l*) *Willis v. Hiscox*, 4 My. & Craig, 197; *Angier v. Stannard*, 3 My. & Keen, 566; *Hampshire v. Bradley*, 2 Coll. 34. See, however, *Pool v. Pass*, 1 Beav. 600; *Holford v. Phipps*, 3 Beav. 434; 4 Beav. 475.

(*m*) 3 My. & Keen, 572.

(1) Where trustees act *bona fide* and with due diligence, they have always received the favor and protection of Courts of Equity, and their acts are regarded with the most indulgent consideration; but, where they have betrayed their trust—grossly violated their duty, or been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict justice; *Diffenderffer v. Winder*, 3 Gill & Johns. R. 312. A trustee may, in the discharge of his duty, consult the opinion of counsel, and if it has been reasonably and properly done, he will be entitled to an allowance for the expense incurred, out of the trust estate; *Jones v. Stockett*, 2 Bland's Ch. R. 409; but the advice so given, will not protect the trustee from the consequences of a failure to

inserted for the indemnity and reimbursement of trustees, to the effect that they shall not be answerable the one for the other of them, or for signing receipts for the sake of conformity, or for involuntary loss ; and that they may reimburse themselves out of the trust funds all costs and expenses incurred in relation to the trust (*n*). But these clauses, though often very highly valued by trustees, really afford them little, if any further protection than they would be entitled to, if left to the ordinary rules of equity (*o*).

In order to provide means for securing trust funds, and for relieving [*227] trustees from the responsibility of *administering them, an act of parliament has recently been passed (*p*) whereby all trustees, executors, administrators, or other persons having in their hands any monies belonging to any trust whatsoever, or the major part of them (*q*), may pay the same, with the privity of the accountant-general of the Court of Chancery, into the Bank of England, to the account of such accountant-general in the matter of the trust, in trust to attend the orders of the court. Bank annuities, East India and South Sea stock, and government and parliamentary securities held upon trust may also be transferred or deposited in like manner. The trust is then administered by the court upon petition in a summary way, without a bill, unless the court direct any suit to be instituted (*r*)(1).

(*n*) See Appendix B.

(*o*) *Fenwick v. Greenwell*, 10 Beav. 412.

(*p*) Stat. 10 & 11 Vict. c. 96, s. 1.

(*q*) See stat. 12 & 13 Vict. c. 74.

(*r*) Stat. 10 & 11 Vict. c. 96, s. 2.

discharge his duty properly, for if he has doubts, or there was room for them, he should apply to a court of equity, which will always give him directions upon which he may rely with entire confidence ; *Freeman et al. v. Cook et al.*, 6 Ired. Eq. R. 373 ; *Weber v. Samuel*, 7 Barr's R. 510.

In the case of *Rogers et als. exec's v. Benson et als.*, 5 Johns. Ch. R. 540, where a trustee, in his character of counsel, gave an opinion in writing concerning the title to certain lands not included in the trust, but the opinion was so loosely drawn as to apply to the trust estate, and the person to whom the opinion was given made sale

of the trust property, it was held that the trustee should not be liable for the act of the person to whom he had given the opinion, there having been no fraud on his part.

(1) Proceedings in courts of equity are originated by bill or by petition. But where new parties are to be brought in, not necessary to the original bill, or where the investigation may involve inquiries, calculated by protracting the cause, to delay parties not interested in such new inquiries, the proceeding must be by bill. A petition is the proper course, when no other persons are to be made parties to litigate the ques-

In some marriage settlements, in addition to the settlement actually made, a covenant is inserted for the settlement of all such property as the intended wife shall become entitled to during the coverture or marriage. It sometimes happens that at the time when such covenant is entered into, the wife is, without being aware of it, entitled to other property, besides that actually settled. In such a case, the general rule is that the property, to which she is then entitled, is subject to the covenant, and ought to be settled, as well as that which she may subsequently acquire (*s*). But as the question is entirely one of intention, if the property to which the wife is entitled appear to have been purposely omitted, it will not be bound by such a covenant (*t*). If the covenant to settle the wife's future *property be entered into [*228] by the intended husband alone, the wife will not be bound to settle any future property to which she may become entitled for her separate use (*u*). Occasionally covenants are unadvisedly entered into by the intended husband to settle on his children, or to leave to them by his will, all the property that he may acquire during the coverture,

(*s*) *Graffy v. Humpage*, 1 Beav. 46; *James v. Durant*, 2 Beav. 177; *Blythe v. Granville*, 13 Sim. 190.

(*t*) *Hoare v. Hornby*, 2 You. & Coll. N. C. 121; *Otter v. Melvill*, 2 De Gex & Smale, 257.

(*u*) *Douglass v. Congreve*, 1 Keen, 410; *Travers v. Travers*, 2 Beav. 179; *Drury v. Scott*, 4 You. & Coll. 264. See also *Butcher v. Butcher*, 14 Beav. 222.

tions presented by it, than such as are, or ought to have been, parties to the original bill; *Hayes v. Miles et al.*, 9 Gill & Johns. R. 193; *Dyckman et al. v. Kernochan et als.*, 2 Paige's Ch. R. 26; *Duval v. The Farmers' Bank of Maryland*, 4 Gill & Johns. R. 292; *Maccubbin v. Cromwell*, 2 Har. & Gill's R. 443. Thus, it is the proper course to pursue, for joining a party who ought to have been joined in the original proceedings; *Williams v. Hall &c.*, 7 B. Mon. R. 295; and for a lunatic, who wishes to traverse his inquisition of lunacy; In the matter of *Christie*, 5 Paige's Ch. R. 242; and it is the proper course also, for a lunatic to take, who wishes to compel his guardian to account; *Tally v. Tally*, 2 Dev. & Bat. Eq. R. 385; and so of an application for a rehearing, whether it be by supplemental bill, or bill of review; *Hunt v. Smith et als.*, 3 Rich. Eq. R. 466; *Huison, adm'r v. Pickett*, 2 Hill's Ch. R. 353;

Wiser v. Blackly et als., 2 Johns. Ch. R. 488; *Livingston v. Hubbs et als.*, 3 Id. 124; *Haskell et al. v. Raval*, 1 McCord's Ch. R. 28; *Colomb et al. v. The Br. Bk. at Mobile*, 18 Ala. R. 454; *Emerson v. Davies et al.*, 1 Wood. & Min. R. 21; *Jenkins v. Eldredge*, 3 Story's R. 299; *Baker v. Whiting et als.*, 1 Id. 218. Application for maintenance may also be made by petition; In the matter of *Bostwick*, 4 Johns. Ch. R. 102.

In South Carolina, by statute, any equitable claim, under the value of £100, may be brought to the notice of the court by petition; *Skilling v. Jackson*, 1 Hill's Ch. R. 185.

In Pennsylvania, the proceedings in the matter of the accounts of trustees, and others acting in a fiduciary capacity, are usually commenced by filing the accounts, or by petition—a bill, to account, is assumed as having been filed.

or all his property generally (*x*). So a father may covenant, on the marriage of his daughter, to leave her as great a share in his property as to any of his other children (*y*). These covenants will be enforced in equity; but from their vague and uncertain character, they are likely to lead to much litigation. A covenant to settle property of a given amount by a certain day appears to create a lien in equity on all the property of the kind covenanted to be settled, to which the covenantor may become entitled before that day (*z*). But a covenant to settle property of a given value, when no time is limited for its performance, creates no lien on any of the property of the covenantor (*a*).

Marriage, as we have seen (*b*), is a valuable consideration (1). Every

(*x*) *Lewis v. Madocks*, 17 Ves. 48; *Needham v. Smith*, 4 Russ. 318; *Needham v. Kirkman*, 4 Barn. & Ald. 531; **Hardey v. Green*, 12 Beav. 182.

(*y*) *Willis v. Black*, 4 Russ. 170; *Clegg v. Clegg*, 2 Russ. & My. 570; *Eardley v. Owen*, 10 Beav. 572; *Jones v. How*, 7 Hare, 267; 9 C. B. 1.

(*z*) *Roundell v. Breary*, 2 Vern., 482; *Wellesley v. Wellesley*, 4 My. & Cr. 561, 581.

(*a*) *Freemoult v. Dedire*, 1 P. Wms. 429; *Berrington v. Evans*, 3 You. & Coll. 384.

(*b*) *Ante*, p. 67.

(1) Not only is marriage regarded as a valuable consideration, *Magniac v. Thompson*, 1 Baldw. R. 344, affirmed, 7 Pet. R. 348; *Carroll v. Lee*, adm'r, 3 Gill & Johns. R. 504; *Bray v. Dudgeon*, 6 Munf. R. 132; *Smith v. Smith's adm'r*, Id. 581; *Hutcher v. Robertson*, exec., 4 Strobh. Eq. R. 179; *De Barante v. Gott et als.*, 6 Barb. S. R. 492; *Dunn v. Thorp*, adm'r, &c., 4 Ired. Eq. R. 7; *Freeman et al. v. Hill*, exec. et al., 1 Dev. & Bat. R. 389; *Trenton Banking Co. v. Woodruff et al.*, 1 Green's C. R. 117; *Armfield v. Armfield*, 1 Freeman's C. R. 311; but it is looked upon as the highest of considerations; *Tunno et al. v. Trezevant et al.*, 2 Desauss. R. 267; and equity will uphold an agreement made in consideration of marriage, in cases where by law, no remedy could be sought; as, where one in contemplation of marriage gave a bond to his intended wife that he would allow her to hold all her personal property to her sole and separate use; though, by the marriage, such bond was, as a legal instrument, extinguished, yet the agreement was upheld, in accordance with the intention of the parties; *Baldwin v. Carter*, 17 Conn. R. 201; but a verbal agreement, though founded upon marriage, will not be valid; *Andrews & Bros. v. Jones et al.*, 10 Ala. R. 400; nor will an agreement in consideration of marriage be supported, unless the circumstances of the parties are such as to warrant the making of a marriage settlement, thus, in the case of *Keith v. Woombwell*, 8 Pick. R. 213, which was an agreement made between two very poor persons in anticipation of marriage, C. J. Parker says, "That two very poor people, depending upon their labor for their living, should, upon a contemplated marriage enter into an agreement, the effect of which would be that the labor of one should go to the support of both, and that the labor of the other should be to the profit of that one only, would be a very unequal bargain, and hardly sustainable in a court of equity. It would be without consideration, and as it respects *future* creditors even, would be fraudulent, for the visible means of the husband in such case, upon which he would gain his daily

settlement, therefore, made by parties of full age, previously to and in consideration of marriage, or made subsequently to marriage in pur-

credit, would be continually diminished, by a secret, invisible consumption, which would keep him down and render him wholly unable to pay his debts."

Where, however, the contract of marriage is valid, it is interpreted like an ordinary contract of sale; if the contract is executed, the wife is regarded as a purchaser, and if executory, as a creditor; *Magniac v. Thompson*, 1 *Baldw. R.* 344, affirmed, 7 *Pet. R.* 348; *Armfield v. Armfield*, 1 *Freem. C. R.* 311; but courts of law will not estimate the value of the marriage, in comparison with the settlement, though equity may do it; *Magniac v. Thompson*, 1 *Baldw. R.* 344, affirmed, 7 *Pet. R.* 348; so, a contract based upon the consideration of marriage will be valid even though the husband was indebted at the time; *Magniac v. Thompson*, 1 *Baldw. R.* 344; *Fones v. Rice et als.*, 9 *Gratt. R.* 568; just as one may sell his property for a good consideration, even though indebted; *Wheaton v. Sexton's Lessee*, 4 *Wheat. R.* 503; but, of course, existing liens will not be defeated by such sale or settlement; *Armfield v. Armfield*, 1 *Freem. C. R.* 311; and to make the contract void for fraud against creditors, both parties must concur in the fraud; *Magniac v. Thompson*, 1 *Baldw. R.* 344; *Andrews & Bros. v. Jones et al.*, 10 *Ala. R.* 400.

And generally, almost any agreement which is reasonable, and made *bona fide* before marriage to secure property to the wife, will be enforced in equity; *Stilley v. Folger et al.*, 14 *O. R.* 649; *Brooks et al. v. Dent, adm'r et al.*, 1 *Md. C. Decs.* 523; *Wood v. Savage, Walk. C. R.* 471; but a post-nuptial settlement made in pursuance of a parol agreement made before marriage, is void as to antecedent creditors; *Reade v. Livingston*, 3 *Johns. C. R.* 481; *Izard v. Izard*, 1 *Bailey's C. R.* 288; *Davidson v. Graves, Riley's C. R.* 219; *Borst v. Covey et al.*, 16 *Barb. S. R.* 136; it is otherwise, however, in regard to a post-nuptial

settlement made in accordance with a written ante-nuptial agreement; *Reade, adm'r v. Livingston et als.*, 3 *Johns. C. R.* 481.

Where post-nuptial settlements are made without consideration, they will be governed by the same rules as voluntary settlements; thus, they are regarded as valid, if made by one not indebted at the time; *Sexton v. Wheaton*, 8 *Wheat. R.* 229; *Picquet v. Swan*, 4 *Mass. R.* 443; *Simpson v. Graves, Riley's C. R.* 232; *United States Bank v. Ennis, Wright's R.* 605; *Beach v. White, Walker's C. R.* 495; and even though he be indebted, provided he has sufficient property in addition to that settled, to pay his debts, or those debts are amply secured by the covenants of the settlement; *Reade, adm'r, v. Livingston et als.*, 3 *Johns. C. R.* 481; *Picquet v. Swan*, 4 *Mass. R.* 443; *Thompson v. Dougherty*, 12 *Serg. & Raw. R.* 448; *Ridgway v. Underwood*, 4 *Wash. C. C. R.* 137; *Hopkirk v. Randolph, adm'r, &c.*, 2 *Brockenb. R.* 130; *Pinney et al. v. Fellows*, 15 *Vt. R.* 536; *Rundle v. Murgatroyd*, 4 *Dal. E.* 304; such a deed, however, will be only void as to antecedent, and not as to subsequent creditors; *Hind's lessee v. Longworthy*, 11 *Wheat. R.* 199; *Reade, adm'r, v. Livingston et als.*, 3 *Johns. C. R.* 481; *Bennett v. The Bedford Bank*, 11 *Mass. R.* 421; *Ridgway v. Underwood*, 4 *Wash. C. C. R.* 137.

In the case of *Salmon v. Bennett*, 1 *Conn. R.* 525, C. J. Swift remarks, "Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unencumbered for the payment of the grantor's debts; then such a conveyance will be valid against creditors existing at the time."

suance of written articles (c), stands on the footing of a purchase, [*229] *and has equal validity. But a voluntary settlement is liable to be defeated by the creditors of the settlor, if he was so

(c) Stat. 29 Car. II. c. 3, s. 4. See ante, p. 70.

A voluntary settlement is also void as to a subsequent purchaser, with notice; *Sterry v. Arden et als.*, 1 Johns. C. R. 261, affirmed, 12 Johns. R. 536; *Cathcart et als. v. Robinson*, 5 Pet. R. 264, in which last case, C. J. Marshall uses the following language: "There is some contrariety and some ambiguity in the old cases on this subject; but this court conceives that the modern decisions establish the absolute conclusiveness of a subsequent sale to fix fraud upon a family settlement, fraud not to be repelled by any circumstances whatever." And it does not matter whether the sale be from the grantor or grantee under the voluntary deed, save that if from the latter it must be previous to a sale by the grantor, or before it is taken in execution by his creditors; *Anderson et al. v. Roberts et al.*, 18 Johns. R. 516; other cases, however, hold that a voluntary settlement, though void as to creditors, is good as to the grantor and all claiming under him; *Thompson v. Dougherty*, 12 Serg. & Raw. R. 448; *Church v. Church*, 4 Yeat. R. 280; *Shunk v. Endress*, 3 Wat. & Serg. R. 253; *Worrall's Accounts*, 5 Id. 113; but there is no question, that a voluntary settlement will be good as to existing creditors, or subsequent purchasers, by matter *ex post facto*; as, if one gains credit by such settlement, so as to found a consideration for a marriage presently had; *Sterry v. Arden et als.*, 1 Johns. C. R., affirmed, 12 Johns. R. 536; *Huston's adm'r v. Cantril et al.*, 11 Leigh's R. 137; *Hopkirk v. Randolph, adm'r*, 2 Brockenb. R. 130. And a post nuptial settlement for a valuable consideration, is good, as an ordinary transfer of property; *Barron v. Barron et als.*, 24 Vt. R. 376; *Pinney et als. v. Fellows*, 15 Id. 586; *Brooks et al. v. Dent, admr. et al.*, 1 Md.

C. Decs. 523; *Livingston v. Livingston*, 2 Johns. C. R. 537; *Ryan, adm'r v. Bull et al.*, 3 Strobb. Eq. R. 86; *United States Bank et al. v. Brown et als.*, 2 Hill's C. R. 562; *Keith v. Wombwell*, 8 Pick. R. 213.

It is not absolutely indispensable that there should be a trustee to a marriage settlement; *Carroll v. Lee, adm'r*, 3 Gill & Johns. R. 504; *Exec. of Allen v. Rumph et als.*, 2 Hill's C. R. 4; *Croswaight &c. v. Hutchinson &c.*, 2 Bibb's R. 407; *Barron v. Barron et als.*, 24 Vt. R. 376; for, if no trustee is named, the husband will take that office; *Hamilton v. Bishop et al.*, 8 Yerg. R. 33; *Picquet v. Swan*, 4 Mass. R. 443; *Griffith's adm'r v. Griffith*, 5 B. Mon. R. 118; *Baldwin v. Carter*, 17 Conn. R. 201; *Kenley v. Kenley*, 2 How. (Miss.) R. 751; but, agreements entered into between husband and wife during coverture are void at law; *Wallingsford v. Allen*, 10 Pet. R. 583; *Sheppard v. Sheppard*, 7 Johns. C. R. 57; *Harkins et al. v. Coalter et al.*, 2 Port. R. 463; *Duffy v. The Insurance Co.*, 8 Wat. & Serg. R. 413; *Wood v. Warden, adm'r &c.*, 20 O. R. 521; *Hutton v. Hutton's adm'r*, 3 Barr's R. 100; though they are good in equity, if upon a valuable consideration; *Wallingsford v. Allen*, 10 Pet. R. 583; *Sheppard v. Sheppard*, 7 Johns. C. R. 57; *Harkins et al. v. Coulter et al.*, 2 Port. R. 463; *McKenna v. Phillips*, 6 Whart. R. 571; *Trenton Banking Co. v. Woodruff et al.*, 1 Green's C. R. 117; *Shirley v. Shirley et al.*, 9 Paige's C. R. 363; *Griffith's adm'r v. Griffith*, 5 B. Mon. R. 118; *Bridges v. Wood*, 4 Dana's R. 610; *Smith v. Smith's adm'r*, 6 Munf. R. 581; *Duffy v. The Insurance Co.*, 8 Wat. & Serg. R. 413; *Wood v. Warden, adm'r*, 20 O. R. 521; *Stiles v. Fleming, exec. et als.*, 1 Dev. Eq. R. 185; *Ex parte Wells*, 3 Desauss. R. 158; *Hutton v. Hut-*

much indebted at the time as to bring the settlement within the provisions of the statute of the 13th of Elizabeth (*d*) already noticed (*e*), by which the alienation of goods and chattels made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them. For although by the phrase "goods and chattels" was intended only such personal property as could be taken by the sheriff under an execution on a judgment (*f*), yet as almost all kinds of personal property may now be taken in execution (*g*), or charged with the payment of judgment debts (*h*), it would seem that all such property is now within the compass of the statute (*i*) (1). The voluntary assignment of goods or chattels, or delivery or making over of bills, bonds, notes or other securities, or the voluntary transfer of any debts made by a person being at the time insolvent (*k*), is also void in the event of his bankruptcy (*l*). This provision appears to embrace all personal estate capable of assignment or transfer (*m*); but it does not extend to a gift of money (*n*).

Although a voluntary settlement may thus be defeated by creditors, yet, when once completed, it is binding on the settlor, who cannot, by

(*d*) Stat. 13 Eliz. c. 5; *Skarf v. Soulby*, 1 Mac. & Gord. 364.

(*e*) *Ante*, p. 45.

(*f*) *Sims v. Thomas*, 2 Adol. & Ell. 536.* See *ante*, p. 47.

(*g*) Stat. 1 & 2 Vict. c. 110, s. 12. See *ante*, p. 108.

(*h*) Stat. 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1. *Ante*, pp. 108, 162, 178.

(*i*) See *Edwards v. Cooper*, 11 Q. B. 33.*

(*k*) See *Cutten v. Sanger*, 2 You. & Jerv. 459.*

(*l*) Stat. 12 & 13 Vict. c. 106, s. 126, repealing stat. 6 Geo. 4, c. 16, s. 73, to the same effect.

(*m*) *Brown v. Bellaris*, 5 Mad. 53.

(*n*) *Ex parte Shortland*, 7 Ves. 88; *Kensington v. Chandler*, 2 Mau. & Selw. 36: *Ex parte Skerratt*, 2 Rose, 384.

ton's adm'r, 3 Barr's R. 100; but an agreement between husband and wife to live separate and apart from each other, is good neither at law nor in equity, unless through the intervention of a trustee; *McKenna v. Phillips*, 6 Vt. R. 571; *Simpson v. Simpson*, 4 Dana's R. 141; *Carson v. Murray et als.*, 3 Paige's R. 483; *Reed v. Beazley*, 1 Blackf. R. 97; *Rogers v. Rogers*, 4 Paige's R. 516; *Champlin v. Champlin et als.*, 1 Hoff. C. R. 55; the contrary has however been held, where the agreement was consummated; see *Hutton v. Hutton's adm'r*, 3 Barr's R. 100.

(1) But in Pennsylvania, lands are considered as chattels for the payment of debts,—creditors have a legal right to take the property of their debtors in execution, and any conveyance made to defeat them is void; *Reichart v. Castator*, 5 Bin. R. 112; and in case of insolvency, the assignees have power to recover and dispose of all such real or personal estate as the insolvent shall have (prior to the assignment) conveyed or transferred with intent to defraud his creditors; *Purd. Dig.* (1853) pp. 440, 441.

[*230] any means, undo *it (*o*). Thus, in one case (*p*), a maiden lady not immediately contemplating marriage, but thinking such an event possible, transferred a sum of stock into the names of trustees in trust for herself until she should marry, and, after her marriage, in trust for her separate use for her life, free from the control of any person or persons with whom she might intermarry, and after her decease, upon trusts for the benefit of any such husband, and her child or children by any husband or husbands. She afterwards, being still unmarried, filed a bill in Chancery, praying that the settlement might be delivered up to her to be cancelled, and that the stock might be ordered to be retransferred by the trustees. But the court held that she was bound by the settlement she had made, and was not entitled to any assistance to release her from it (*l*).

If however the object of the settlor is merely his own benefit or convenience, the settlement will be revocable by him at his pleasure. Thus where a man, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, his object is said to be, not to benefit his creditors, but to benefit himself by the payment of his debts (*q*). He may accordingly revoke the trust thus created (*r*) so long as the creditors remain in ignorance of it (*s*). This rule, however, though well established, seems to attribute [*231] *to debtors a somewhat light estimation of the claims of their creditors; and there appears to be no disposition in the courts to extend it (*t*).

The statute of Elizabeth (*u*), by which voluntary settlements of lands

(*o*) *Ellison v. Ellison*, 6 Ves. 656; *Edwards v. Jones*, 1 My. & Craig. 226; *Newton v. Askew*, 11 Beav. 145; *Kekewich v. Manning*, 1 De Gex, Mac. & Gord. 176.

(*p*) *Bill v. Cureton*, 2 My. & Keen, 403; see also, *Petre v. Espinasse*, 2 My. & Keen. 496,

(*q*) Per Sir C. Pepys, M. R., 2 My. & Keen, 511, cited by Wigram, V. C. in *Hughes v. Stubbs*, 1 Hare, 479.

(*r*) *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Acton v. Woodgate*, 2 My. & Keen, 492; *Ravenshaw v. Hollier*, 7 Sim. 3; *Law v. Bagwell*, 4 Dru. & Warren, 398; *Smith v. Keating*, 6 C. B. 136; **Driver v. Mawdesley*, 16 Sim. 511.

(*s*) *Browne v. Cavendish*, 1 Jones & Lat. 606, 635; *Griffith v. Ricketts*, 7 Hare, 299, 307; *Mackinnon v. Stewart*, 1 Sim. N. C. 76, 89, 90; *Harland v. Binks*, 15 Q. B. 713.*

(*t*) See *Wilding v. Richards*, 1 Coll. 661; *Simmonds v. Palles*, 2 Jones & Lat. 489; *Kirwan v. Daniel*, 5 Hare, 493, 429-501.

(*u*) Stat. 27 Eliz. c. 4; *Principles of the Law of Real Property*, 56, 1st ed.; 59, 2d ed.; 62, 3d ed.

(1) But see ante, p. 228, note, and 229, note.

and other hereditaments are void as against subsequent purchasers for valuable consideration, though it extends to chattels real (*x*), does not apply to purely personal estate (*y*) (1). A voluntary settlement of personal estate cannot therefore be defeated by a subsequent sale of the property by the settlor.

Settlements of any definite and certain principal sum of money, or share in the funds, or Bank, East India, or South Sea stock, or in the stock or funds of any other company or corporation, are now liable to an ad valorem duty of one-fourth per cent. or five shillings per hundred pounds, on the amount of the money or the value of the stock or share settled, according to the table contained in the last Stamp Act (*z*), with a progressive duty of ten shillings for every *entire* quantity of 1080 words beyond the first 1080.

*CHAPTER II.

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OF JOINT OWNERSHIP AND JOINT LIABILITY.

THERE may be a joint ownership of any kind of personal property in the same manner as there may be a joint tenancy of real estate (*a*); and the four unities of *possession*, *interest*, *title* and *time*, which characterize a joint tenancy of real estate, apply also to a joint owner-

(*x*) Co. Litt. 3 b; 6 Rep. 72.

(*y*) 2 My. & Keen, 512.

(*z*) Stat. 13 & 14 Vict. c. 97.

(*a*) See Principles of the Law of Real Property, p. 99, 1st ed.; 104, 2d ed.; and 109, 3d ed.

(1) On the subject of voluntary settlements of personal estate, and that their validity or invalidity is, in this country, as a general thing, determined by the same rules which regulate such settlements of land, see Bayard et als. v. Hoffman et als., 4 Johns. Ch. R. 450; Bank U. S. et al. v. Huth, 4 B. Mon. R. 444; Bohn v. Headley, 7 Har. & Johns. R. 257; Toumin v. Buchanan's exec., 1 Stew. R. 67; Backhouse's adm'r v. Jett's adm'r, 1 Brockenb. R. 500; Thayer v. Thayer et als., 14 Vt. R. 107; Davis v. Payne's adm'r, 4 Rand. R. 332; Huston, adm'r, v. Cantrill et al., 11 Leigh's R. 157; Bentley et al. v. Harris, adm'r, 2 Gratt. R. 357; Beckham v. Secrest, 2 Rich. Eq. R. 54; Worthington et al. v. Shipley, 5 Gill's R. 445; Fleming v. Townsend, 6 Geo. R. 103; Wilson v. Buchanan, 7 Gratt. R. 334; Smith v. Stern, 6 Har. R. 360; McVicker v. May, 3 Barr's R. 227; Penrod v. Morrison, adm'r, 2 Pa. R. 126; Clemens v. Davis, 7 Barr's R. 264; Streeper v. Eckert, 2 Wh. R. 302; Stark v. Ward, 3 Barr's R. 328; Forsyth v. Matthews, 2 Har. R. 100.

ship of chattels. But as no estates can exist in personal property, the distinctions which hold with respect to joint estates for life, in tail, or in fee, do not occur in a joint ownership of personalty. If personal property, whether in possession or in action, be given to A. and B. simply, they will be joint owners, having equal rights as between themselves, during the joint ownership, and being, with respect to all other persons than themselves, in the position of one single owner. Hence it follows, that if a bond or covenant be given or made to two or more jointly, they must all join in suing upon it (b); and a release by one of them to the obligor is sufficient to bar them all (c) (1). As a further consequence of the unity of a joint ownership, the important

(b) *Slingsby's case*, 5 Rep. 18 b; *Petrie v. Bury*, 3 Barn. & Cres. 353; *1 Wms. Saund. 291 i.

(c) 2 Rol. Abr. 410 (D), pl. 1, 5.

(1) In general all the obligees or covenantees should join in suing upon a joint contract; *Eisenhart et als. v. Slaymaker*, 14 Serg. & Raw. R. 153; *Halliday v. Doggett et als.*, 6 Pick. R. 359; *Williams et al. v. Ehringhaus et al.*, 2 Dev. R. 511; *Blanchard v. Dyer*, 21 Maine R. 111; *Moody et al. v. Sewall*, 14 Id. 295; *Darling v. Simpson*, 15 Id. 175; *Jellison v. Lafonta*, 19 Pick. R. 245; *Archer v. Dunn*, 2 Wat. & Serg. R. 360; *Sims v. Tyre*, 3 Brev. R. 249; *Hays et al. v. Lasater et al.*, 3 Pike's R. 565; *Archer v. Boyne*, 3 Scam. R. 526; *Richardson v. Jones*, 1 Ired. R. 296; *Bailey v. Powell et al.*, 11 Misso. R. 416; *Sims et al. v. Harris*, 8 B. Mon. R. 55; *Strange v. Floyd*, 9 Gratt. R. 474; and the joint owners of personal property are properly joined in an action of replevin to recover possession; *McArthur v. Lane*, 15 Maine R. 245; *Hart v. Fitzgerald*, 2 Mass. R. 509; provided their interests in the property are not separate and distinct, *Chambers v. Hunt*, 3 Harris. R. 343; and they may also join in an action of trespass for an injury thereto; *Glover et al. v. Austin*, 6 Pick. R. 209; *Pickering v. Pickering et al.*, 11 N. H. R. 141; *Smoot v. Wathen, adm'r*, 8 Misso. R. 525. But all the parties plaintiffs need not be joined, provided there is a legal cause for omitting some, such as

their death, coverture, or refusing to be joined; *Sneed v. Wiester, &c.*, 2 Marsh. R. 283; *Hays et al. v. Lasater*, 3 Pike's R. 565; *Strange v. Floyd*, 9 Gratt. R. 474. So, where the moving cause of action of two or more joint covenantees is several and not joint, each may maintain his several action on the covenant; *Blakey, &c., v. Blakey et al.*, 2 Dana's R. 462; *Bailey v. Powell et al.*, 11 Misso. R. 416; *Sims et al. v. Harris*, 8 B. Mon. R. 55; thus, where several were interested in a fund, and one was paid his share, it was held that the others were entitled to sue separately, the payment of one being considered an acknowledgment on the part of the debtor, that they had several interests; *Parker v. Elder*, 11 Hump. R. 547; and, where there are joint owners of a vessel, one may sue for his share of the surplus proceeds of a sale on execution against himself and the other owners; *Hopkins v. Forsyth*, 2 Har. R. 34.

In the case of *Mytinger v. Spinger*, 3 Wat. & Serg. R. 405, where money was contributed by several individuals, and deposited in the hands of a stakeholder, as a wager upon the result of an election, it was held by ROGERS, J., that, "If there were originally a partnership, it being illegal, it would go for nothing, and each

right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property. Whether the subject of the joint ownership be a chattel real as a lease, or a chose in possession as a horse, or a chose in action as a debt or legacy, the surviving joint owner will be entitled to the whole, *unaffected [*233] by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties (*d*). And for this reason trustees of settlements of personal estate are always made joint owners, in order that the surviving trustees may take the entire fund, rather than that the executors or administrators of any trustee who may happen to die should have any right to intermeddle with the share of the deceased.

If the joint ownership be created by a will, it is not necessary that the shares of all the joint owners should vest at the same time. Thus

(*d*) Litt. sects. 281, 282; *Lady Shore v. Billingsley*, 1 Vern. 482; *Willing v. Baine*, 3 P. Wms. 115; *Morley v. Baird*, 3 Ves. 629.

of the parties would recover only on his original right of action, and consequently for himself. The law will not recognize a partnership for an illegal purpose, and for that reason the Court is bound to treat the transaction of partnership as if it had never been;" and in the case of *App v. Coryell*, 3 Pa. R. 494, where a similar principle was involved, the Court said, "The contract being void, the money could be recovered only on the promise implied from the receipt of it to the plaintiff's use, which, in this respect, is determined by the nature of the consideration, * * * no money, however, is received to a man's use but his own; consequently the law implies no promise to any one but the owner." But see to the contrary of these cases, *Gray v. Wilson*, 1 Meigs' R. 394, decided in Tennessee, where betting is not forbidden by statute, and which also holds, "that though one of several interested in a joint fund, be paid, he cannot without the consent of all, withdraw his name, or dismiss the suit, even as to himself."

Even though the interests of those making the contract are unequal, if the contract is made by them all jointly, they should all join in suing upon it; *Gayle v. Martin*, 3 Ala. R. 593; *Haughton et al. v. Bayley et al.*, 9 Ired. R. 337.

A release by one partner of a partnership debt, will extinguish the claim of all the partners; a principle equally true in all cases of joint contracts; *Pierson et al. v. Hooker*, 3 Johns. R. 68; *Southworth v. Packard*, 7 Mass. R. 95; *Kimball et al. v. Wilson*, 3 N. H. R. 96; *Fitch et al. v. Forman*, 14 Johns. R. 172; *Salmon et al. v. Davis*, 4 Bin. R. 375.

In case of the death of one or more of the parties to a joint contract, the survivors or survivor must sue upon the claim; *Beebe et al. execs., v. Miller*, Minor's R. 364; *Vandenheuvel v. Storrs*, 3 Conn. R. 208; *Collison v. Little*, 2 Port. R. 89; *Penn v. Butler*, 4 Dal. R. 354; and when all are dead, the action should be brought by the representatives of the last survivor; *Stowell's adm'r v. Drake*, 3 Zabr. R. 310.

under a bequest to A. for life, and after his decease to the issue (*e*) or children (*f*) of B., without words of severance, all the issue or children, born in A.'s lifetime, will become entitled jointly, though some may not be living when the shares of the others become vested interests (1). On the decease of any of them therefore before payment, the survivors will become entitled to their shares. A similar exception to the unity of *time* occurs also in the case of a devise of real estate by will (*g*).

In analogy to the rule by which a joint estate in fee-simple in lands is created by a limitation to two or more, *their heirs and assigns*, it is customary with conveyancers to make a gift of personal estate to two or more jointly, by limiting it to them, *their executors, administrators and assigns*. This however, though usual, is not strictly necessary.

[*234] In ill-framed *instruments, limitations of personalty are sometimes made to two persons, "and the survivor of them, and the executors and administrators of such survivor." If, however, the persons are simply made joint owners, the law will be sufficient of itself to carry the property to the survivor. Bonds and covenants, when intended to be given or made to two or more jointly, are in like manner usually given or made to the obligees or covenantees, *their executors and administrators*; or if the subject-matter be assignable, to them, *their executors, administrators and assigns*. But when entered into with two or more persons, bonds or covenants cannot, as respects the obligees or covenantees, be joint or several, at their election, for one and the same cause; for otherwise the court would be in doubt for which of them to give judgment (*h*). And whether a covenant be joint or several depends much more upon the subject-matter than upon the words employed. If each of the covenantees has a separate interest, each may have a separate cause of action, and the covenant will accordingly in such a case be several, though expressed to be made with the covenantees jointly and severally (*i*). But if each of the covenantees has not a separate cause of action, all of them must concur in suing upon the covenant, even although it be expressed to

(*e*) *Bridge v. Yates*, 12 Sim. 645.

(*f*) *Amies v. Skillern*, 14 Sim. 428.

(*g*) See *Principles of the Law of Real Property*, 102, 1st ed.; 107, 2d ed.; 112, 3d ed.

(*h*) 5 Rep. 19 a; 1 East, 501.

(*i*) 5 Rep. 19 a; 1 Wms. Saund. 155 a, no. (1).

(1) See ante, p. 216, note.

be made with some of them, "and as a separate covenant" with the others (*k*); for if all may sue, all must (*l*).

An exception to the right of survivorship between joint owners occurs in the case of partners in trade (1). In this *case the [235] law, in order to the encouragement of commerce, vests in the executors or administrators of a deceased partner, the share of the deceased in all personal chattels in possession, such as merchandize

(*k*) *Slingsby's case*, 5 Rep. 18 b; *Anderson v. Martindale* 1 East, 497; *Foley v. Addenbrooke*, 4 Q. B. 197; * *Hopkinson v. Lee*, 6 Q. B. 964; * *Bradburne v. Botfield*, 14 Mee & Wels. 559; * *Wakefield v. Brown*, 9 Q. B. 209; * *Keightley v. Watson*, 3 Exch. Rep. 716.*

(*l*) 4 Q. B. 208; *Wetherell v. Langston*, 1 Exch. Rep. 634.*

(1) In cases of solvency, the surviving partner is the owner at law, of all the partnership effects; *Knox v. Schepler*, 2 Hill's R. 595; *Slatter v. Carrol*, 2 Sandf. C. R. 580; Territory of Fla., for the use, &c., *v. Redding et als.*, 1 Fla. R. 444; and as such is the party to sue and be sued, for all partnership claims or liabilities; *Alsop v. Mather*, 8 Conn. R. 587; *Pendleton et al v. Phelps et al.*, 4 Day's R. 476; *Sturgess v. Beach*, 1 Conn. R. 509; *Yale v. Yale*, 13 Id. 185; *Egberts et als. v. Wood et als.*, 3 Paige's C. R. 517; *Sale v. Dishman's execs.*, 3 Leigh's R. 548; *Linney's adm'r v. Dare's adm'r, et al.*, 2 Id 595; *Boyce v. Coster*, 4 Strobb. E. R. 30; *McCandless & Co. v. Hadden*, 9 B. Mon. R. 186; *Bernard v. Wilcox*, 2 Johns. Cas. 374; *Marshall et al. v. De Groot*, 1 Caine's Cas. 122; *Roosevelt et al v. McDowell, exec.*, 1 Kelly's R. 489; *Clarke, adm'r, v. Howe*, 23 Maine R. 560; *Philson v. Adm'r of Bampfield*, 1 Brev. R. 202; *Davis v. Church*, 1 Wat. & Serg. R. 240; *Caldwell, adm'r, &c., v. Stileman*, 1 Raw. R. 215; *Gardiner, adm'r, v. Cumming et al.*, 1 Geo. Decs. 1; *Harwood et al. v. Jones*, 10 Gill & Johns. R. 405; *Robinson v. Thompson et al.*, 1 Smed. & Mar. C. R. 454; *Hammon v. St. John et al.*, 4 Yerg. R. 107; *Southard v. Lewis*, 4 Dana's R. 148; *Andrew's heirs, &c., v. Brown's adm'r, et al.*, 21 Ala. R. 437; *Walker, adm'r, et al. v. House*, 4 Md. C. Decs. 44; *Burgwin v. Adm'r of Hostler*, 1 Tayl. R. 124. This *jus accrescendi*, only holds to enable the survivor to get in the debts, and settle the affairs of the firm, *Jarvis v. Hyer et als.*, 4 Dev. R. 367; and his interest, therefore, is merely a legal one, which he must use for the purpose of bringing the partnership accounts to a settlement; *Lang's heirs v. Warning*, 17 Ala. R. 154; *White v. The Union Ins. Co.*, 1 N. & McCord's R. 557; for discharging which duty, he will not be entitled to compensation; *Beatty v. Wray*, 7 Har. R. 516.

But where the surviving partner is insolvent, and there is no partnership fund, equity will give a remedy against the representatives of the deceased partner; *Sale v. Dishman's exec.*, 5 Leigh's R. 548; *Linney's adm'r v. Dare's adm'r, et al.*, 2 Id. 595; *Emanuel v. Bird, adm'r*, 19 Ala. R. 596; *Wilder et als. v. Keeler et als.*, 3 Paige's C. R. 167; *Marshall et al. v. De Groot*, 1 Caines' Cas. 122; *Philson v. Adm'r of Bampfield*, 1 Brev. R. 202; *Caldwell, adm'r v. Stileman*, 1 Raw. R. 215; *Southard v. Lewis*, 4 Dana's R. 148; *Hammersley v. Lambert et al.*, 2 Johns. C. R. 508; *Horse, &c., v. Heath, &c.*, 5 Ham. R. 355. In some of the States, however, by statute, the representatives of a deceased partner may be sued, even when the surviving partner is solvent, and for that purpose

or ships, which were the joint property of the partnership (*m*). But this rule does not extend at law to *choses in action*, which must accord-

(*m*) Co. Litt. 182 a; Kempe v. Andrews, 2 Lev. 290; Rex v. Collector of Customs, 2 Mau. & Selw. 223; Buckley v. Barber, 6 Exch. Rep. 164.*

may be joined with him as defendants; McLain et al. v. Carson, exec., 4 Pike's R. 164; Maxey v. Averill's execs., 2 B. Mon. R. 108; Ransom v. Pomeroy, adm'r, 8 Blackf. R. 383; and by a statute of Tennessee, the doctrine of survivorship does not apply to the case of land held by a firm; Gaines v. Catron, 1 Humph. R. 514.

Where the executor of a partner continues the business of a testator, he thereby becomes a partner, and liable as such, not in his representative, but in his individual capacity; Alsop v. Mather et al., 8 Conn. R. 584; Egberts et als. v. Wood et als., 3 Paige's C. R. 517.

There is no such analogy between death and insolvency in cases of partnership, as to give by law a solvent partner, the sole administration of the assets, where the remaining partners are insolvent; Hubbard et als. v. Guild, 1 Duer's R. 662.

Real estate, when purchased with partnership funds, and for partnership purposes, is regarded as partnership property; Brooke v. Washington, 8 Gratt. R. 248; Wheatley's heirs v. Colhoun, 12 Leigh's R. 272; Pierce's adm'r v. Triggs' heirs, 10 Id. 424; Whislow v. Chiffelle, S. C. Eq. (Harper's), 25; Edgar v. Donnally et al., 2 Munf. R. 387; Deloney v. Hutcheson, 2 Rand. R. 183; Buchan v. Sumner, 2 Barb. C. R. 166; Donaldson v. The Bank of Cape Fear, 1 Dev. C. R. 106; Divine, &c., v. Mitchum, 4 B. Mon. R. 489; and even when purchased in the name of the partners as tenants in common, it will, if for partnership purposes, be deemed, in equity as partnership estate; Hoxie v. Carr et als., 1 Sumn. R. 171; Sigourney v. Mann et als., 7 Conn. R. 11; Smith v. Tarlton et al., 2 Barb. C. R. 336; so likewise, where the name of one of the partners only, is used; Boyers v. Elliott, 7 Humph. R. 204; Hunt

et al. v. Benson, 2 Id. 459; and under these circumstances, the realty is considered in equity, as personal property; Hoxie v. Carr et als., 1 Sumn. R. 171; Buck, &c., v. Winn, &c., 11 B. Mon. R. 322; Boyce v. Coster, 4 Strobb. E. R. 30; Rice v. Barnard et als., 20 Vt. R. 479; Delmonico v. Guillaume, 2 Sandf. C. R. 366; Platt v. Oliver et als., 3 McL. R. 27; Andrew's heirs, &c., v. Brown's adm'r, et al., 21 Ala. R. 437; and may be taken in execution, and sold, under a writ of *fi. fa.*, Hunter v. Martin, 2 Richard. R. 541; but, at law, real estate so purchased, is considered as the several property of the partners; Burnside et als. v. Marick et als., 4 Metc. R. 537; Dyer v. Clark adm'r, et al., 5 Id. 562; Howard et als. v. Priest et al., Id. 582; Blake v. Mutter, 19 Maine R. 16, in which last case it was doubted, whether a different rule would hold, even in equity, in that State against the express provisions of statute c. 35, § 1, "Which provides, that all lands conveyed to two or more persons, shall be held by them as tenants in common, and not as joint tenants, unless the conveyance contain express words clearly showing a different intention;" in case too, of the death of one of the partners, the legal title descends and vests in his heirs at law; Yeatman v. Woods, 6 Yerg. R. 20; Andrew's heirs, &c., v. Brown's adm'rs, &c., 21 Ala. R. 437; and as the several property of each of the partners, such property may be taken in execution at the suit of a creditor of one of the partners, as to his share, but equity will compel him to hold it in trust, to be applied if necessary to the payment of the partnership claims, Peck et als. v. Fisher, 7 Cush. R. 386.

In Buck, &c., v. Winn, &c., 11 B. Mon. R. 322, it was intimated, that if partnership funds were invested in real estate, not

ingly be sued for in the name of the survivor (*n*). In equity, however, the share of the deceased partner, both in the choses in possession and

(*n*) *Martin v. Crompe*, 1 Lord Raym. 340; *S. C.* 2 Salk. 444; 2 Wms. Saund. 117 b. n. (2).

necessary or intended to be used in the business of the firm, either bought for speculation, or as an investment, it would be regarded as partnership assets; in New York, however, it has been decided, that in order to have that effect, the real estate so purchased must be for partnership purposes, *Cox v. McBurney et als.*, 2 Sandf. S. R. 561; and this has also been decided in the Circuit Court of the United States, for the Eastern District of Pennsylvania, in the able opinion delivered by Judge Washington in the case of *Philips v. Crammond*, 2 Wash. C. C. R. 442, in which he says, "Crammond purchased a piece of ground on the Schuylkill, containing about twenty-eight acres, upon which he built a house for a country-seat, and in other respects improved the same at considerable expense, to which he gave the name of Sedgely. The purchase money for this property, and what was expended in improving it, was drawn from the partnership funds, and the conveyance was made to Crammond alone. * * * The general principle is, that if a receiver, executor, factor, or trustee, lays out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money, which has been thus invested, may follow the same, and consider the purchase as made for his use, and the purchaser a trustee for him. Upon the same principle, I conceive that a resulting trust would arise to a partnership concern in lands purchased by one of the partners, and paid for out of the joint funds. * * * But this species of resulting trust is open to certain qualifications, amongst which it is proper to notice the following, viz: that the person whose money was invested in the purchase, is not obliged to take the

land, and to consider the purchaser as his trustee, but may elect to treat him as his debtor, and to claim the money instead of the property. As a consequence of this, and because the claim to a resulting trust is merely that of an equity, founded upon the presumptive interest of the parties, that equity may be rebutted, even by parol evidence and circumstances to defeat it. * * * This qualification of the doctrine seems to be decisive of the present case. * * * Nothing can be more clear, than that the property in question was purchased and improved for the sole and separate use of Wm. Crammond, and that his partners so understood and assented to it. The circumstances to establish these facts are conclusive. The nature of the property—a country-seat, improved at an immense expense, in the vicinity of the place at which the purchaser alone resided, capable of affording to him an elegant luxury, but totally useless and unproductive to the concern, and out of the view and scope of the business in which they were engaged." In the State of Pennsylvania, where partners wish to make real estate partnership property, as to subsequent purchasers without notice, or judgment creditors, they must do it by some deed, or instrument of writing, recorded; *Ridgway's Appeal*, 3 Har. R. 177; *Lancaster Bank v. Myley*, 1 Id. 544; *Hale v. Henrie*, 2 Wat. R. 143. In *Patterson v. Brewster*, 4 Edw. C. R. 352, it was ruled, that there cannot be a partnership in buying and selling real estate; but the contrary has been decided in *Reamer v. Arthur's et al.*, 7 Barr's R. 171; *Brady et als. execs. v. Colhoun et als., adm'rs*, 1 Pa. R. 140; *Dudley v. Littlefield*, 21 Maine R. 422.

Where real estate is considered partnership assets, judgments for partnership debts

in action belonging to the partnership, devolves on his executors or administrators. The consequence is that, though the choses in action must be sued for by the surviving partner, he will be a trustee of the share of the deceased partner for his executors or administrators (*o*). The same rule is applied in equity even to real estate purchased for the purposes of a trading partnership (*p*), and conveyed to the partners as joint tenants in fee. On the decease of any of them, equity holds the survivors to be trustees of the share of the deceased for his executors or administrators as part of his personal estate (*q*).

Indeed, as a general rule, joint ownership is not favoured in equity, on account of the right of survivorship which attaches to it (*r*). If therefore two persons advance money by way of mortgage or other-
 [*236] wise, and take the *security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased, of the share advanced by him (*s*). And when the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured (*t*).

An ownership in common (or, as it is usually styled in analogy to

(*o*) *Jeffereys v. Small*, 1 Vern. 217; *Lake v. Craddock*, 3 P. Wms. 158.

(*p*) *Randall v. Randall*, 7 Sim. 271.

(*q*) *Phillips v. Phillips*, 1 My. & Keen, 649, 663; *Broom v. Broom*, 3 My. & Keen, 443; *Morris v. Kearsley*, 2 You. & Coll. 139; *Bligh v. Brent*, 2 You. & Coll. 258; *Houghton v. Houghton*, 11 Sim. 491; *Custance v. Bradshaw*, 4 Hare, 315, 322; see *Cookson v. Cookson*, 8 Sim. 529.

(*r*) 2 Atk. 55; 2 Ves sen. 258.

(*s*) *Petty v. Stayward*, 1 Chan. Rep. 57; 1 Eq. Ca. Ab 290.

(*t*) See *Principles of the Law of Real Property*, 342, 1st ed.; 343, 2d ed.; 355, 3d ed.

will be payable out of the proceeds, in preference to judgments obtained against the partners individually; *Overholtz's Appeal*, 2 Jones' R. 222; *Divine, &c., v. Mitchum*, 4 B. Mon. R. 488; a purchaser, however, at sheriff's sale, without notice of the partnership claim, will hold against the creditors of the firm, *Buck, &c., v. Winn, &c.*, 11 B. Mon. R. 322; and the same principle seems to have ruled the case of *McDermot v. Laurence*, 7 Serg. & Raw. R. 438, which decided, that where real estate was taken by partners on ground rent, and buildings erected thereon, for the purpose of carrying

on glass works, which was subsequently mortgaged by one partner, without notice to the mortgagee of partnership debts then existing, the property was to be considered as between the mortgagee and partnership creditors as real estate, and liable in the first instance to the mortgage. The real estate owned by the partners after the payment of all the debts of the firm, and the adjustment of all the partnership equities, will be treated as real estate; *Buckley v. Buckley*, 11 Barb. S. R. 44; *Buchan v. Sumner*, 2 Barb. C. R. 166.

real estate, a tenancy in common) of chattels may arise either from the severance of a joint ownership, or from a gift to two or more to hold in common (*u*). As, however, a chose in action is inalienable at law, a joint ownership of a chose in action cannot be severed at law by either, or even by both, of the joint owners. Thus in case of the bankruptcy of a joint creditor, by which all his estate becomes vested in his assignees, an action against the debtor must be brought in the joint names of the assignees and the other joint creditors (*x*). And if two joint creditors should become bankrupt, the action must be brought in the joint names of all the assignees of both of them (*y*). A tenancy in common cannot in fact exist at law of a chose in action. A. may owe 20*l.* to B. and C. jointly, or he may owe 10*l.* to B. and 10*l.* to C.; but he cannot owe 20*l.* to B. and C. in common. If each has a several cause of action, each must sue separately. In equity, however, the case is different. Though B. and C. are joint owners at law, in equity they may be owners in common; and on the decease of either of them, his share may in equity belong to his representatives, instead of accruing beneficially* to his companion. When a limita- [*237] tion is made by deed to two or more persons as tenants in common, there is very seldom any difficulty. But in wills, where greater indulgence is given to informal words, the rule is, that any words which denote an intention to give to each of the legatees a distinct interest in the subject of gift, will be sufficient to make them tenants in common. Thus a gift by will to two or more persons "equally to be divided" between them (*z*), or simply "between them (*a*)," or "in joint and equal proportions (*b*)," or "equally (*c*)," or "respectively (*d*)," or "to be enjoyed alike (*e*)," will make such persons tenants in common, and not joint tenants, as they would have been without the insertion of such words. In this respect the rule is the same whether the subject of the devise or bequest be real or personal estate (*f*).

(*u*) Litt. sect. 321.

(*x*) *Thomason v. Frere*, 10 East, 418; see stat. 12 & 13 Vict. c. 106, s. 152, repealing stat. 5 & 6 Vict. c. 122, s. 31, to the same effect.

(*y*) See *Hancock v. Heywood*, 3 T. Rep. 433.

(*z*) *Blisset v. Cranwell*, 1 Salk. 226; *Phillips v. Phillips*, 2 Vern. 430; 1 Eq. Ca. Abr. 292, pl. 6; 1 P. Wms. 34.

(*a*) *Lashbrook v. Cock*, 2 Mer. 70.

(*b*) *Ettricke v. Ettricke*, 2 Ambl. 656.

(*c*) *Lewen v. Dodd*, Cro. Eliz. 443, (d) 1 Atk. 580; 1 Ves. sen. 104.

(*e*) *Loveacres d. Mudge v. Blight*, Cowp. 352.

(*f*) See 2 Jarm. Wills, 161 et seq.

Owners in common of personal estate, like tenants in common of lands, have merely a unity of possession: the interest of one may be larger or smaller than that of the other, one having, for instance, one-third, and the other, two-thirds of the property. So their title need not be the same, as one may have been originally a joint tenant with a third person, who may have severed the joint tenancy by assigning his moiety to the other. The right of survivorship, which springs from a unity of interest and title, has accordingly no place between owners in common (*g*).

[*238] *Connected with the subject of joint ownership is that of joint liability. Two or more persons may be jointly liable to the same debt or demand. In a joint bond, the obligors, according to the usual form, bind themselves, their heirs, executors and administrators jointly; and in a joint covenant, they, in like manner, covenant for themselves, their heirs, executors and administrators jointly. In every case of joint liability, each is liable for the whole debt (*h*), yet they are all, like joint owners, considered as one person (1). They must

(*g*) Litt. sect. 321.

(*h*) 1 Barn. & Ald. 35.

(1) Whether a contract be joint, or joint and several, each of the contractors is liable for the whole debt; *Ward v. Johnson et al.*, 13 Mass. R. 148; *McMahan v. Murphy*, 1 Bailey's R. 535; and where an obligation is joint and several, proceedings may be instituted against either one, or all, of those bound; *Ward v. Johnson*, 13 Mass. R. 148; *Crane, adm'r, v. Alling*, 3 Green's R. 423; *Dudley's (Geo.) R.* 423; *Merrick v. The Bank of the Metropolis*, 8 Gill's R. 61; but the suit must be against one, or all, and cannot be against any intermediate number; *Minor et al. v. The Mechanics' Bank of Alexandria*, 1 Pet. R. 73; and the personal representatives of one deceased, are equally liable with their testator or intestate; *Bulkley v. Wright et al.*, exec's, 2 Root's R. 70. So, the fact of one of several joint and several covenantors having been sued, will not prevent a subsequent action as to another, or all jointly, provided of course, the previous action has not resulted in a satisfac-

tion of the demand; *Ward v. Johnson et al.*, 13 Mass. R. 148; *Sheehy v. Mandeville*, 5 Cranch's R. 254; *Townsend v. Riddle*, 2 N. H. R. 448. In the case of *Willings et al. v. Consequa*, Pet. C. C. R. 301; it was held, that "where two or more persons are liable for a simple contract debt, a judgment obtained against one of them, is an extinguishment of the claim on the other debtors, in the same manner, as a bond, given by one of two persons liable on a simple contract, is an extinguishment of the original debt." By a statute of Pennsylvania, however, it is now enacted, that "where a judgment shall be hereafter recovered against one or more of several co-partners, or joint and several obligors, promisors or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded, are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits against any person or persons, who might

accordingly all be sued together during their joint lives (*i*); and a release to one of them will discharge them all (*k*). It is, however, provided by the Bankrupt Act that the certificate of conformity of a bankrupt shall not discharge any person who was at the time of the bankruptcy jointly bound, or had made any joint contract, with the bankrupt (*l*). And if any person jointly liable upon any simple contract shall be discharged by the Statute of Limitations, but his co-contractor or co-contractors shall be liable by virtue of a new acknowledgment or promise, judgment may be given and costs allowed against the latter person or persons only (*m*) (1). And if such person or persons shall plead in abatement that the other ought to be jointly sued, and it shall appear that he was discharged by the statute, the issue joined on such plea shall be found against such person or persons pleading the same (*n*). After the decease of any one joint debtor the survivors or survivor of them may still be sued for the whole debt, as though the *deceased had had no share in it (*o*), and the estate of the [239] deceased will be discharged from all liability both at law and in equity (*p*) (2). So if a judgment be obtained against two or more

(*i*) 1 Wms. Saund. 291 b, n. (4).

(*k*) 2 Rol. Abr. 412 (G), pl. 4; Clayton v. Kynaston, 2 Salk. 574; 2 Wms. Saund. 47 gg, n. (1); Warwick v. Richardson, 14 Sim. 281.

(*l*) Stat. 12 & 13 Vict. c. 106, s. 200, repealing stats. 6 Geo. IV. c. 16, s. 121, and 5 & 6 Vict. c. 122, s. 37, to the same effect.

(*m*) Stat. 9 Geo. IV. c. 14, s. 1.

(*n*) Sect. 2.

(*o*) Richards v. Heather, 1 Barn. & Ald. 29.

(*p*) Richardson v. Horton, 6 Beav. 185; Wilmer v. Currey, 2 De Gex & Smale, 347; Crossley v. Dobson, 2 De Gex & Smale, 486.

have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably or by adversary process."

Purd. Dig. (1853,) p. 466, Sec. 36.

(1) One of several joint contractors, cannot by his admissions revive the liability of the other obligors, extinguished by the statute of limitations, though he may his own; Mott v. Petrie, &c., 15 Wend. R. 317; Bowdre v. Hampton. 6 Richard. R. 208. But the acknowledgment of a debt, by one partner, after a dissolution of the firm, is sufficient to take a case out of the statute as regards the others; Smith, adm'r, v.

Ludlow et al., 6 Johns. R. 267, though the mere acknowledgment by one is not considered a sufficient proof of an existing debt, to bind the other; Hackley v. Patrick, 3 Johns. R. 536.

(2) In all cases of joint obligation, the surviving debtor is the party liable, who must be sued alone, without being joined with the representatives of the decedent; Hott v. Petrie, &c., 15 Wend. R. 317; Waters' represents. v. Riley's adm'r, 2 Har, & Gill's R. 305; Preston v. Preston, 1 Har. & Johns. R. 366; Murphey's adm'r's v. The Branch Bank of Alabama, 5 Ala. R. 421; Boykin v. Watson's adm'r's, 3 Brev.

jointly, and one of them die, the personal estate of the survivor or survivors will be exclusively liable to be taken in execution, although the real estate of the deceased, being bound from the date of the judgment, must contribute equally with the real estate of the survivors (*q*).

A liability, however, may be both joint and several at the same time; and, as such a liability is more beneficial to the creditor, it is more usual than a liability which is simply joint. A joint and several bond runs in this form:—"for which payment to be well and truly made, we bind ourselves, and each of us, and the heirs, executors and administrators of us and of each of us, jointly and severally;" or, if there be a larger number of obligors, say five, the better form is:—"for which payment to be well and truly made, we bind ourselves, and each of us, and any two, three or four of us, and the heirs, executors and administrators of us, and of each of us, and of any two, three or four of us, jointly and severally." In this case, an action may be brought against all the obligors, or against any one, two, three or four of them whom the obligee may select; otherwise he must have sued either all of them jointly, or any one of them singly (*r*). A joint and several covenant is usually in this form:—"And the said A. B. and C. D. do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby *for himself re-
[*240] spectively, and for his respective heirs, executors, and administrators, covenant," &c.; or if there are more than two covenantors, the better form is, for the reason above given, "And the said A. B., C. D., E. F. and G. H., do hereby for themselves, their heirs, executors and administrators jointly, and any two or three of them, do hereby for themselves, their heirs, executors and administrators jointly,

(*q*) 3 Rep. 14 b; *Smarte v. Edsun* 1 Lev. 30; 2 Wms Saund. 51.

(*r*) Per Buller J., in *Streatfield v. Halliday*, 3 T. Rep. 782.

R 260; *Poole v. McLeod*, 1 Smed. & Mar. R. 391; *The State Treasurer v. Friott et al.*, adm'rs, 24 Vt. R. 134; *Bradley v. Burwell*, 3 Denio's R. 61. But by statutes of Tennessee, Massachusetts, Mississippi, and North Carolina, the representatives of a deceased obligor, may be joined in an action against the survivor; *Perkins v. Hadley*, 4 Hayw. R. 152; *Claribon v. Goodloe*, Cook's R. 391; *Simpson et al. v. Young et als.*, 2 Hump. R. 514; *Foster et al. v. Hooper*, adm'r, 2 Mass. R. 572; *Henderson et al. v. Talbert*, 5 Smed. & Mar. R. 109; *Smith v. Fagan et al.*, 2 Dev. R. 298; *Taylor v. Taylor*, 5 Hump. R. 110.

Some few cases also hold, that in equity, a bond will be treated as several, so as to make the representatives of a deceased obligor, proportionably liable; *Smith et al. exec's v. Martin et al.*, exec's, 4 Des-sauss. R. 148; *Haggins v. Peck*, adm'r., 10 B. Mon. R. 217.

and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators covenant," &c. In all cases of joint and several liability, each party is individually liable, and may be sued alone for the whole debt, or if the creditor please, he may sue them all jointly. In consequence of the joint liability, a release of one of the debtors will discharge them all; and as they are all discharged, the creditor will thenceforth be unable even to sue any of them severally (s) (1). As, however, the several liability is distinct

(s) 2 Rol. Abr. 412 (G), pl. 5; *Clayton v. Kynaston*, 2 Salk. 574; *Nicholson v. Revill*, 4 Adol. & Ell. 683; * S. C. 6 Nev. & Man. 192.

(1) That the release of one of several joint, or joint and several debtors will operate as a release of all, is doubtless too firmly established as a legal doctrine to be easily overthrown; *The American Bank v. Doolittle*, 14 Pick. R. 123; *Ward v. Johnson et al.*, 13 Mass. R. 148; *Brown v. Marsh*, 7 Vt. R. 320; *Bank of Catskill v. Messenger et als.*, 9 Cow. R. 37; *Harrison v. Close et al.*, 2 Johns. R. 448; *Rowley v. Stoddard*, 7 Id. 207; *Barrington et als. v. The Bank of Washington*, 14 Serg. & Raw. R. 405; *United States v. Thompson*, Gilp. R. 614; *Willings et al. v. Consequa*, Pet. C. C. R. 301; *Walker v. McCulloch*, 4 Greenl. R. 421; *Abel v. Forgue*, 1 Root's R. 502; *Crane, adm'r, v. Ailing*, 3 Green's R. 423; *Åverill v. Lyman*, 18 Pick. R. 352; *Goodnow v. Smith et al.*, Id. 414; *Bronson et als. v. Fitzhugh et al.*, 1 Hill's R. 185; *Clagett et al. v. Salmon*, 5 Gill & Johns. R. 315; *McAllester et al. v. Sprague et al.*, 34 Maine R. 296; *Kirby v. Taylor et al.*, 6 Johns. Ch. R. 242; *Frink v. Green*, 5 Barb. S. R. 455; *Bozeman v. The State Bank*, 2 Eng. R. 328; *Hoffman v. Dunlop, et als.*, 1 Barb. S. R. 185; *Benjamin et al. v. McConnell et al.*, 4 Gilm. R. 536; *Gray's exec's v. Brown*, 22 Ala. R. 262; and, it seems to have been determined upon the principle, that whether the obligation be joint, or joint and several, the debt is entire, "and when once satisfied or released, can no longer be enforced against any party to it;" *Wiggin v. Tudor et al.*, 23 Pick. R. 444; but it may well be doubted whether the case of *Burson v. Kincaid*, 3 Penna. R. 57, which decides that the release of one joint co-obligor is a release of all, but a release of an obligor in a joint and several obligation, is not a release of all, is not more in accordance with general principles of law; the reasoning of Judge Kennedy in that case, is certainly entitled to very great respect—"In the abstract," he says, "it is certainly true, and the principle of law well settled, that if a creditor release one of two joint debtors, whether they be indebted upon a simple contract, bond or judgment, it will also be a discharge of the other from the debt. Why is it so? because otherwise the whole burden of the debt would be thrown upon one of them, instead of both, which would be directly contrary to their undertaking and contract. Upon the same principle it has been held, that if the obligee in a bond, given to him by two or more jointly, tear off the seal of one of the joint obligors, or in any manner cancel the bond as to one of them, it discharges all the rest. It was in its concoction, the joint bond of the whole; but the moment it is cancelled by the obligee as to one of the obligors, it ceases to be the bond or deed of all. In short, it ceases to be the same bond, if bond at all it can be called. By the original contract under which it was given, it was agreed, and made to be, the joint obligation of all; and without a new agreement between the same parties, it cannot be changed and made a bond singly of any one or more of them, short of the whole number, without their consent. But the

from the joint, it is competent to the creditor, in releasing one of the debtors, expressly to reserve his remedy against the others; and in

obligee or covenantee may release one of two several obligors named in a bond, or one of two several covenantors in a deed, or cancel the bond or deed as to one, by tearing off his seal without the consent of the other, and for this reason too, that it does not increase the responsibility of the other obligor or covenantor, or change in any manner the nature of his obligation or covenant. It was the bond or deed of each singly before, and the obligee or covenantee had a right to look to either singly for the fulfilment of it, and the one, therefore, can in nowise be injured by cancelling the bond or deed as to the other." But where all parties agree to the release of one of the obligors, or covenantors, of a joint bond, or deed, the contract will still be binding as to the remaining parties, for as the learned judge continues to observe, in the case last cited, "It is well settled, that if the name of one of two or more joint obligors be stricken out or erased, or his seal torn from a bond by the consent of the obligee and the other obligors, it shall cease to be the bond of him whose name is so stricken out or erased from it; but shall from that time be the bond of the others. And for what reason? Because it was their agreement that it should be so. Their agreement alone, in this respect, without more, is equivalent to a new, and re-execution and redelivery of the bond, as their act and deed." And see, *Barrington et als. v. The Bank of Washington*, 14 Serg. & Raw. R. 405; *Bronson et als. v. Fitzhugh et al.*, 1 Hill's R. 185; *Rogers v. Hosack's exec's*, 18 Wend. R. 319.

A release, however, of one joint contractor, to be binding, must be a technical release, that is, under seal, thereby importing a good consideration; *Bank of Catskill v. Messenger et als.*, 9 Cow. R. 37; *Harrison v. Close et al.*, 2 Johns. R. 448; *Rowley v. Stoddard*, 7 Id. 207; *Walker v. McCulloch*, 4 Greenl. R. 421; *Shaw v. Pratt*, 22 Pick. R. 305; *De Zeng v. Bailey*

et als., 9 Wend. R. 336; *McAllester et al. v. Sprague et al.*, 34 Maine R. 296; *Frink v. Green*, 5 Barb. S. R. 455; *Shock v. Miller*, 10 Barr's R. 401; but, a release, which is made a part of the decree of a court, is a technical release, though not under seal; *Benjamin et al. v. McConnell et al.*, 4 Gilm. R. 536. Some of the cases hold, that equity will not relieve against releases of this description; *Willings et al. v. Consequa*, Pet. C. C. R. 301; *Joy v. Wurtz*, 2 Wash. C. C. R. 266; while others have determined that equity will interpret the release according to the intentions of the parties and the justice of the case; *Claggett et al. v. Salmon*, 5 Gill. & Johns. R. 315; *Norris' adm'r v. Hammett et al.*, Charl't. R. 267; *Kirby v. Taylor et al.*, 6 Johns. C. R. 242; but fraud, of course, avoids the release; *Carter v. Connell et als.*, 1 Wh. R. 392. Any thing, however, which operates as a complete voluntary discharge of one joint debtor, will discharge the others also; thus, where the obligee in a joint and several bond, appointed one of the administrators of one obligor, having assets, to be one of his own executors, the debt will be thereby paid, and the surviving obligor discharged; *Giffith v. Chew, exec.*, 8 Serg. & Raw. R. 17; and where there was a joint execution against two persons, and one of them was taken in execution, and then voluntarily discharged by the creditor, it was held that this was a release of both, *Gould v. Gould et al.*, 4 N. H. R. 173; so, where one injured by several jointly, gave a receipt to one of them "in full" of said L.'s trespass, when he and Wilson P. Hunter, (another defendant) were in company together with others, it was held to operate as a discharge of the other joint-trespassers, *Gilpatrick v. Hunter et al.*, 24 Maine R. 18; but the taking of a new security from one of two joint debtors will not operate as a release, unless it is intended to have that effect, *Parker v. Cousins*, 2 Gratt. R. 372; nor will an

this case, each of the remaining debtors will continue severally liable (*t*). So he may covenant with one of the debtors never to sue him; and in such a case he will retain his remedy against the others severally (*u*). On account of the several liability, the estate of a person who has become jointly and severally bound, is not discharged by his decease in the lifetime of his co-debtors, but still remains liable to the entire

(*t*) *Ex parte Gifford*, 6 Ves. 807; *Thompson v. Lack*, 3 C. B. 540.* See, however, *Kearsley v. Cole*, 16 Mee. & Wels. 136.

(*u*) *Lacy v. Kynaston*, 2 Salk. 575; 2 Wms. Saund. 48, n. (1).

assignment by a joint debtor to a creditor of all his interest in consideration of his indebtedness, have the effect of a release so far as to discharge other joint debtors; *McLarren v. Robinson*, 8 Har. R. 127.

Where F., one of two common carriers, jointly charged by the plaintiffs with negligence, agreed with the plaintiffs by a simple contract in writing, that if the latter would release T., the other carrier, it should not impair or affect any liability which he F. might have incurred, or was subject to; and thereupon T. was released accordingly; it was held, that F.'s agreement not being under seal, did not qualify the release, so as to prevent its operating the discharge of both F. and T. from the original cause of action; *Bronson et als. v. Fitzhugh et al.*, 1 Hill's R. 185.

But a covenant not to sue one of several joint, or joint and several debtors, will not operate as a release, but will only discharge the one with whom the covenant was made; who may have his remedy if it should be broken by joining him as defendant; *Tuckerman et als. v. Newhall*, 17 Mass. R. 581; *Brown v. Marsh*, 7 Vt. R. 320; *Bank of Catskill v. Messenger et als.*, 9 Cow. R. 37; *Harrison v. Close et al.*, 2 Johns. R. 448; *Rowley v. Stoddard*, 7 Id. 207; *Walker v. McCulloch*, 4 Greenl. R. 421; *Mason et al. v. Jonett's adm'r*, 2 Dana's R. 107; *Reed v. Shaw*, 1 Blackf. R. 245; *Shed v. Pierce*, 17 Mass. R. 623; *Sewall v. Sparrow*, 16 Id. 24; *Ruggles v. Patten*, 8 Id. 480; *Crane, adm'r v. Alling*, 3 Green's R. 423; *Durell v. Wendell et al.*, 8 N. H. R. 369; *Goodnow v. Smith et al.*, 18 Pick. R.

414; *McAllester et al. v. Sprague et al.*, 34 Maine R. 296; *Fink v. Green*, 5 Barb. S. R. 455; *Bozman v. The State Bank*, 2 Eng. R. 328; *Miller v. Fenton*, 11 Paige's C. R. 19; *Couch v. Mills et als.*, 21 Wend. R. 424; *Browning & Co. v. Grady, adm'r*, 10 Ala. R. 999; nor, will a receipt in full to one joint debtor for his share of the liability, effect the discharge of all; *Rowley v. Stoddard*, 7 Johns. R. 207; *Andrews v. Andrews et al.*, 1 Root's R. 72; *Shotwell v. Miller, Coxe's R.* 81; *Rogers v. Hemstead, Kirby's R.* 44; *Shock v. Miller*, 10 Barr's R. 401; nor can a discharge of one of several joint obligors by operation of law, relieve the other obligors; *Ward v. Johnson et al.*, 13 Mass. R. 148: but, an actual satisfaction of the debt by one joint debtor will release all; *Walker v. McCulloch*, 4 Greenl. R. 421; and so of payment in full, by one of two or more joint trespassers in satisfaction of the damage committed: *Gee v. Overby*, 7 Eng. R. 164.

The law as regards joint trespassers or wrong-doers, seems to be the same with that of joint obligors, as respects the effect produced by a release of one, or a covenant entered into with one to indemnify him from all legal proceedings; *Snow v. Chandler*, 10 N. H. R. 92; *Bronson et al. v. Fitzhugh et al.*, 1 Hill's R. 185; but they may be sued separately; *Gee v. Overby*, 7 Eng. R. 164.

Where all the joint obligors or covenantors are dead, the proper parties to proceed against are the representatives of the survivor; *Beebe et al., exec's, v. Miller, Minor's R.* 364.

debt as respects the creditor, and to a proportion of it as respects the surviving co-debtors.

[*241] *One of the most usual means of incurring a joint and several liability is the entering into a partnership. At law the liability of partners is joint only as to debts, incurred by the partnership; so that they ought all to be joined as defendants to an action at law for recovering any such debt (x). But a dormant partner, whose name may or may not be known, may either be joined or not at the pleasure of the creditor (y)(1), unless the contract be under seal, in which case, as the deed is itself the contract, and not merely evidence

(x) See *Rice v. Shute*, 5 Burr. 2611; 1 Wms. Saund. 291 b, n. (4).

(y) *De Mautort v. Saunders*, 1 Barn. & Adol. 398; * *Beckham v. Drake*,* 9 Mee. & Wels. 79; 11 Mee. & Wels. 315.*

(1) A secret partner is as much governed by the transactions of the acting partner, as if his name was used; *Shead v. Barrinton*, et al., 1 Stew. R. 134; but this law is confined to trade and commerce, and does not extend to speculations in the purchase of lands; *Pitts v. Waugh* et al., 4 Mass. R. 425.

An action may be sustained by the ostensible partners without joining those that are dormant; *Lord v. Baldwin*, 6 Pick. R. 350; *Wilkes v. Clark*, 1 Dev. R. 178; *Shropshire v. Shepherd*, 3 Ala. R. 733; *Monroe v. Ezzell*, 11 Ala. R. 603; *Clarkson v. Carter*, 3 Cow. R. 84; and the dormant partner should not be joined; *Boardman v. Keeler* et al., 2 Vt. R. 65; *Clark et al. v. Miller* et al., 4 Wend. R. 628; but where the ostensible partners are dead, the surviving dormant partner may sue alone; *Beach v. Hayward*, 10 O. R. 455. On the other hand, dormant partners, when discovered, may be joined as parties defendant; *Griffith & Co. v. Buffum* et al., 22 Vt. R. 181; *Everett et al. v. Chapman* et al., 6 Conn. R. 347; *Lea v. Guice*, 13 Smed. & Mar. R. 657; *Reynolds v. Cleveland* et al., 4 Cow. R. 282; but they need not be so joined; *Sylvester et al. v. Smith*, 9 Mass. R. 119; for a dormant partner is an allowable, not an essential party; *Desha et al. v. Holland*, 12 Ala. R. 513; *Clark et al. v. Miller* et al., 4 Wend.

R. 628; hence, where in the case of a secret partnership, an execution was levied on the goods in the name of the ostensible partner, it was held that it should not be postponed for a subsequent one in the names of both the partners; *Brown's Appeal*, 5 Har. R. 480.

Where one takes a note from an ostensible partner, upon which a judgment is obtained, an execution issued, and returned, "*nulla bona*," it has been held, that the holder of the note will not be thereby barred from a suit against all the partners; *Watson et al. v. Owens* et al., 1 Richard. R. 111; *Sheey v. Mandeville* et al., 6 Cranch's R. 254; but this has been denied in Pennsylvania, in *Smith et al. v. Black*, 9 Serg. & R. 142, which particularly noticing the case of *Sheey v. Mandeville*, nevertheless decided in accordance with what would seem to be the fixed legal principle, that a judgment recovered against one partner, is a bar to a subsequent suit against both, (where there are two,) though the new defendant was a dormant partner at the time of the contract and not discovered until after suit.

The admissions of a dormant partner, who is proved to be so, may be given in evidence to bind the firm; *Kaskaskia Bridge Co. v. Shannon* et al., 1 Gilm. R. 15; *Shepherd v. Ward*, 8 Wend. R. 342.

of it (*z*), those only can be sued on it who have sealed and delivered it. In equity, however, in favour of creditors, all partnership debts are considered to be both joint and several. On the decease of a partner, therefore, his estate will be liable in equity to all the partnership debts incurred previous to his decease (*a*); and the creditors may if they please, resort in the first instance to the estate of the deceased, leaving it to his representatives to recover from the surviving partners their share of the debts (*b*). It seems, however, that in analogy to the rule in bankruptcy, next stated, the separate creditors of the deceased partner would first be paid in full out of the estate, before its application to the payment of any of the debts of the partnership (*c*).

In the case of the bankruptcy of a trading-partnership, the rule which is always followed in the payment of the debts is, that the joint assets of the firm are in the first place liable to the partnership debts; and that the *separate estate of each partner is in the first place [*242] liable to his separate debts, which must be paid in full out of such separate estate, before any of it can be applied towards payment of the debts of the partnership (*d*)(1). Any creditor of a partnership

(*z*) Ante, p. 79.

(*a*) *Devaynes v. Noble*, 1 Meriv. 529, 563; 2 Russ. & Ry. 495.

(*b*) *Wilkinson v. Henderson*, 1 M. & Keen, 582; *Braithwaite v. Britain*, 1 Keen, 206; *Thorpe v. Jackson*, 2 You. & Coll. 553; *Way v. Basset*, 5 Hare, 55.

(*c*) *Gray v. Chiswell*, 9 Ves. 118; *Brown v. Weatherby*, 12 Sim. 6, 10.

(*d*) *Ex parte Elton*, 3 Ves. 238, 241; *Ex parte Kensington*, 14 Ves. 447; *Ex parte Peake*, 2 Rose, 54; *Ex parte Harris*, 1 Mad. 583; *Ex parte Janson*, 3 Mad. 229; *Re Plummer*, 1 Phil. 56.

(1) At law, partners have a right to dispose of their property as they please; *McDonald et al. v. Beach et al.*, 2 Blackf. R. 55; and separate or joint creditors may attach either separate or joint property; *Bardwell v. Perry et als.*, 19 Vt. R. 292; *Jarvis et al., adm'rs, v. Brooks, et al., adm'rs*, 3 Fost. R. 131; but equity will not allow a partner to dispose of his stock in trade for the purpose of paying his own creditors to the exclusion of those of the partnership; *Ferson v. Monroe*, 1 Fost. R. 462; *French v. Lovejoy*, 12 N. H. R. 458; nor to sell, or mortgage his undivided interest in a specific part of the property belonging to the partnership; *Lovejoy v. Bowers*, 11 N. H. R. 404; and, any such attempt to appropriate the partnership property to his individual benefit, will be regarded as a fraud upon his co-partners; *Filley et al. v. Phelps et als.*, 18 Conn. R. 294; *Rogers & Sons v. Batchelor et als., adm'rs*, 12 Pet. R. 221; *Yale v. Yale*, 13 Conn. R. 185. This is in accordance with that equitable principle, that partnership property is to be applied to the payment of partnership debts, before a separate creditor can be allowed to resort to it; *Lord v. Baldwin*, 6 Pick. R. 350; *Morrison v. Blodgett et al.*, 8 N. H. R. 248; *Murray v. Murray et als.*, 5 Johns. C. R. 60; *Conkling et al. v. The Washington University et al.*, 2 Md. C. Decs. 497; *Pierce, adm'r, et al. v. Tiernan et al.*, 10 Gill. & Johns R. 253; *McDonald et al. v. Beach et*

may however be a petitioning creditor in respect of his debt, on the bankruptcy of any individual member of the firm; and in that case he

al., 2 Blackf. R. 55; *White v. The Union Ins. Co.* 1 N. & McCord's R. 557; *Wilson et al. v. Conine*, 2 Johns. R. 282; *McCulough v. Dashiell*, 1 Har. & Gill's R. 96; *Tucker v. Oxley*, 5 Cranch's R. 35; *White v. Dougherty et als.*, Mart. & Yerg. R. 309; *Doner et als. v. Stauffer et als.*, 1 Pa. R. 198; *Woodrop v. Ward*, 3 Desauss. R. 203; *Gardiner et al. v. Smith*, 12 La. R. 370; *Emanuel v. Bird, adm'r*, 19 Ala. R. 596; *Grosvenor & Co. v. Austin*, 6 O. R. 103; *Muir v. Leitch et al.*, 7 Barb. S. R. 341; *Buchan v. Sumner*, 2 Barb. C. R. 166; *Christian v. Ellis*, 1 Gratt. R. 396; *Nicoll et al. v. Mumford*, 4 Johns. C. R. 522; *Deveau v. Fowler*, 2 Paige's C. R. 400; *Jackson v. Cornell et al.*, 1 Sandf. C. R. 348; *Murriel et al. v. Neill et al.*, 8 How. R. 414; *Washburn et als. v. The Bank of Bellows Falls et als.*, 19 Vt. R. 278; *Wilder et als., v. Keeler et als.*, 2 Paige's C. R. 167; *Smith v. Barker et al.* 10 Maine, R. 158; *Lucas et al. v. Atwood et al.*, 2 Stew. R. 378; *Glum v. Gill*, 2 Md. R. 15; *Burtus v. Tisdale et al.*, 4 Barb. S. R. 571.

"But this, like every other general rule, admits of exceptions; and it is hardly indeed susceptible of strict application in any cases but those of bankruptcy, insolvency and execution. The consequences of its application to partnerships would be highly injurious to trade, and embarrassing to justice. * * * It has been repeatedly settled here, as well as in England, that the partner may be sued for separate debts, that the partnership effects may be taken in execution and sold by moieties; and that the purchaser of the moiety, under the execution, shall be considered as tenant in common with the partner;" *McCarty v. Emlen*, 2 Dal. R. 278. "Each partner is entitled to the possession of the partnership property; if one excludes the other no action at law lies—the remedy is in equity. So, if the sheriff, by virtue of an execution against one of several partners, takes

possession of the property, an action at law, I apprehend, does not lie against him. The court from which the execution issued would stay proceedings upon it, to give time to have an account taken in equity; but if no such stay is obtained, the officer can sell the right of the partner who is defendant in the execution. According to the rule in equity, the partnership accounts should all be liquidated before a sale on execution, * * but if the sale should be made, and the purchaser should take the property, would he be a trespasser? or would he not be tenant in common with the other partner of the partnership property, subject to the claims of the creditors of the partnership? The sheriff or other officer, in making a levy, and taking the property to a place of safe deposit, is surely not a trespasser;" *Scrugham v. Carter*, 12 Wend. R. 133.

That the partnership goods may be attached, or levied upon, under an execution for the separate debt of one of the partners, is not doubted; *Bradbury v. Smith*, 21 Maine R. 122; *Douglass v. Winslow*, 20 Id. 89; *Reed v. Johnson*, 24 Id. 322; *Reed v. Shepardson*, 2 Vt. R. 120; *Schatzell & Co. v. Bolton*, 2 McCord's R. 478; *Knox v. Schepler*, 2 Hill's R. 595; *Morgan v. Watmough*, 5 Whart. R. 525; *Dow, adm'r, v. Sayward*, 14 N. H. R. 9; *Clark v. Lyman, adm'r*, 8 Vt. R. 290; *Whitney v. Ladd*, 10 Id. 165; *Burrall v. Acker*, 23 Wend. R. 606; *Place v. Sweetzer et als.*, 16 O. R. 142; *Clark v. Allee*, 3 Harring. R. 80; *Knox et al. v. Summers*, 4 Yeat. R. 477; but the preponderance of authority would seem to determine, that the sheriff cannot take the goods out of the possession of the other partners; *Siliter et al. v. Walker*, 1 Freem. C. (Missi.) R. 77; *Deal v. Bogue*, 8 Har. R. 233; *Newman et al. v. Bean*, 1 Fost. R. 93, and cases above cited; and he can only sell the interest of the partner who is defendant in the execu-

will be entitled to a dividend on his debt out of the estate of such bankrupt rateably with his separate creditors (e). And the other

(e) *Ex parte Ackerman*, 14 Ves. 604; *Ex parte Detastet*, 17 Ves. 247.

tion; *Doner et als. v. Stauffer et als.*, which has been held in a case where the sheriff's sale was by sample, *Treadwell v. Roscoe*, 3 Dev. R. 50; but the sheriff should levy upon "*all the partnership effects*," * * * because the moiety is undivided; for if he seize but a moiety, and sell that, the other partner will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner;" *Slaver v. White et al.*, 6 Munf. R. 111; *Phillips v. Cook*, 21 Wend. R. 393; *Scrugham v. Carter*, 12 Id. 133. Where a sale has been made under such an execution, the proceeds must be paid over to the execution creditor, and the recourse of the partners, or of the creditors of the firm, is against the partnership property, for the purchaser has only acquired an interest in the assets after the payment of the partnership debts and liabilities; *Phillips v. Cook*, 24 Wend. R. 393; *Wilson et al. v. Conine*, 2 Johns. R. 282; *Doner et als. v. Stauffer et als.*, 1 Pa. R. 198. But an attachment by a creditor of one of the partners will not prevail against a subsequent attachment of a joint creditor; *Pierce v. Jackson*, 6 Mass. R. 242; *Allen et als. v. Wells et al.*, 22 Pick. R. 455; nor will it be good against partnership property in the hands of a creditor of the firm, who may retain for his debt; *Morgan v. Watmough*, 5 Whart. R. 525; and, see *Clark v. Allee*, 3 Harring. R. 80.

That the sheriff in an execution against the partnership property, for a debt due by an individual partner, "can sell only the actual interest which such partner has in the partnership property, after the accounts are settled, or subject to the partnership debts, which are first to be paid," has been repeatedly decided; *Jarvis v. Hyer et als.*, 4 Dev. R. 364; *Barber v. The Hartford Bank*, 9 Conn. R. 407; *Lyn-*

den v. Gorham et als., 1 Gallis' R. 367; *Fisk v. Herrick*, 6 Mass. R. 271; *Church et al. v. Knox et al.*, 2 Conn. R. 514; *Brewster et als. v. Hammett et als.*, 4 Id. 240; In the matter of *Smith*, 16 Johns. R. 102; *Nicoll et al. v. Mumford*, 4 Johns. C. R. 325; *Goodwin v. Richardson*, adm'r, 11 Mass. R. 472; *Gibson v. Stevens*, 7 N. H. R. 352; *Moody v. Payne*, 2 Johns. C. R. 548; *Knox v. Schepler*, 2 Hill's R. 595; *Doner et als. v. Stauffer et als.*, 1 Pa. R. 198; *Wilter v. Richards*, 10 Conn. R. 37; *Filley et als. v. Phelps et als.*, 18 Conn. R. 294; *Rogers & Sons v. Batchelor et als.*, adm'rs, 12 Id. 221; *Yale v. Yale*, 13 Conn. R. 185; *Burtus v. Tisdale et al.*, 4 Barb. S. R. 571; *Clark v. Allee*, 3 Harring. R. 80; *Treadwell v. Roscoe*, 3 Dev. R. 50; *Merrill et al. v. Rinker*, 1 Baldw. R. 534; *Sitler et al. v. Walker*, 1 Freem. C. (Missi.) R. 77; *Deal v. Bogue*, 8 Har. R. 233; this interest of the individual partner is his share of the surplus after the payment of the partnership debts, and settlement of the partnership equities; *Newman et al. v. Bean*, 1 Fost. R. 93; *Morrison v. Blodgett et al.*, 8 N. H. R. 248; *Nicoll et al. Mumford*, 4 Johns. C. R. 525; *White v. Dougherty et als.*, Mart. & Yerg. R. 309; *Doner et als. v. Stauffer et als.*, 1 Pa. R. 198; *Witter v. Richards*, 10 Conn. R. 37; *Filley et als. v. Phelps et als.*, 18 Id. 294; *United States v. Huck et al.*, 8 Pet. R. 271; *Rogers & Sons v. Batchelor et als.*, adm'rs, 12 Id. 221; *Yale v. Yale*, 13 Conn. R. 185; *Buchan v. Sumner*, 2 Barb. C. R. 166; *Sutcliffe v. Dohrman*, 16 O. R. 181; *Place v. Sweetzer et als.*, Id. 142; *Clark v. Allee*, 3 Harring. R. 80; *Sitler et al. v. Walker*, 1 Freem. C. R. 77; this is all that a partner can pass by assignment; *Rodriguez v. Hefferman*, 5 Johns. C. R. 417; *Nicoll et al. v. Mumford*, 4 Id. 525; *Doner et als. v. Stauffer et als.*, 1 Pa. R. 198; *Burtus v. Tisdale et al.*, 4 Barb. S. R. 571;

partnership creditors may prove their debts on such separate bankruptcy in order to have vote in the choice of creditors' assignees, and

and the purchaser becomes a tenant in common with the remaining partners; *Gilmore v. The N. A. Land Co. et al.*, Pet. C. C. R. 460; *Phillips v. Cook*, 21 Wend. R. 393; *McCarty v. Emlen*, 2 Dal. R. 278; *Slaver v. White et al.*, 6 Munf. R. 111; *Sitler et al. v. Walker*, 1 Freem. C. R. 77.

The rule that partnership assets are to be applied to the payment of the partnership debts, before the creditor of one of the partners can derive any benefit from it, arises from the equities subsisting between the partners, and not from any preference given to the joint creditors; *Hoxie v. Carr et al.*, 1 Sumn. R. 171; *Doner et al. v. Stauffer et al.*, 1 Pa. R. 198; *Allen et al. v. The Centre Valley Co. et al.*, 21 Conn. R. 180; *Washburn et al. v. The Bank of Bellows Falls et al.*, 19 Vt. R. 278; *Reese et al. v. Bradford et al.*, 13 Ala. R. 837; *Bardwell v. Perry et al.*, 19 Vt. R. 292; *Glenn v. Gill*, 2 Md. R. 15; or, to use the words of Judge Lane, in *Grosvenor & Co. v. Austin's adm'r*, 6 O. R. 112, a co-partnership "creditor is permitted a specific preference to subject that joint fund to the payment of his joint claim, or debt, and this, not because the creditors' rights are enlarged by the existence of the joint fund, but because the interests of the partners are so connected with its distribution, that it is necessary to adopt this rule, to secure the rights of the debtors between themselves. Hence the doctrine has been introduced, that the partnership property should be first applied in satisfaction of the partnership debts; not for the creditors' sake, but because there is a fund which both parties have a right reciprocally to apply for the benefit of a third party;" and, with similar reasoning the case of *Rice v. Barnard et al.*, 20 Vt. R. 479, decided, that "the right of partnership creditors to claim a preference over the creditors of the individual members of the firm, in the distribution of the partnership property, is wholly dependent upon the right of the individual

partners to enforce a lien upon the partnership funds for the payment of the partnership liabilities, before the individual debts; and if the contract of partnership be of such a nature, that the partners can enforce no such right as between themselves, the partnership creditors can claim no such preference." But in *Cammack v. Johnson et al.*, 1 Green's C. R. 167, the chancellor seemed to be of a different opinion, ruling, that "In an open firm, the credit is given to the firm and to the goods they are possessed of, and a partnership creditor shall be first paid out of them; but if the partner be unknown, the credit is given to the visible partner only, and the goods in his possession are supposed to be his own, and in such case the discovery of such latent partner cannot give any preference to a partnership creditor. As between the partners themselves, I see no reason to make any distinction in their rights, whether they are dormant or not; but as to the public, it is not only highly proper, but necessary, to prevent injustice towards creditors, that this difference should be observed." The weight of authority, however, is against the case last cited; and hence it would seem to follow, that if the partnership equity as between the individual partners, was from any cause to cease, the preferred lien of the joint creditors would also expire; and this we find to be the fact, for, where one partner, there being two, sells his interest to the other, the lien of the joint creditors is gone; *Glenn v. Gill*, 2 Md. R. 15; and see also the opinion of Chief Justice Gibson, in the case of *Doner et al. v. Stauffer et al.*, 1 Pa. R. 198.

Joint creditors, may, however, resort to the separate property of the individual partners, before the payment of the separate creditors, for there is no subsisting equity to interfere with their claim, as was held in the case of *Allen et al. v. Wells et al.*, 22 Pick. R. 455, "It is urged, however, on the part of the defendants, that

to be heard against the allowance of the bankrupt's certificate (*f*); but they can receive no dividends till the separate creditors have been

(*f*) Stat. 12 & 13 Vict. c. 106, s. 140, repealing stats. 6 Geo. IV. c. 16, s. 62, and 5 & 6 Vict. c. 122, s. 39, to the same effect. See ante, pp. 126, 130.

as this court, as a court of law, have long since recognized the principle, that an attachment of the goods of a partnership by a creditor of one of the partners, is not valid as against an after attachment by a partnership creditor, it should also adopt the converse of the proposition, giving a like preference to separate creditors in respect of the separate property. But we think that there is a manifest distinction in the two cases. The restriction upon separate creditors as to the partnership property, arises not merely from the nature of the debt attempted to be secured, but also from the situation of the property proposed to be attached. In such a case a distinct moiety or other proportion, cannot be taken and sold, as one partner has no distinct separate property in the partnership effects. His interest embraces only what remains upon the final adjustment of the partnership concerns. But on the other hand, a debt due from the co-partnership, is the debt of each member of the firm, and every individual member is liable to pay the whole amount of the same to the creditor of the firm. In the case of the co-partnership, the interest of the debtor is not the right to any specific property, but to a residuum, which is uncertain and contingent, while the interest of one partner in his undivided property, is that of a present absolute interest in the specific property. Each separate member of the co-partnership being thus liable for all debts due from the co-partnership, and no objection arising from any interference with the rights of others—as joint owners, it seems necessarily to follow, that his separate property may be well adjudged to be liable to be attached and held to secure a debt due from the co-partnership;” and see also, *Bardwell v. Perry* et als., 19 Vt. R. 292, and the cases subsequently cited; but see to the contrary,

Jarvis et al., adm'rs, v. Brooks et al., adm'rs, 1 Fost. R. 141. Where, however, a firm is bankrupt, or insolvent, the separate property is to be first applied to the payment of the individual creditors, before the partnership creditors can resort to it, and under such circumstances the rule that in cases of distribution, partnership funds are first applicable to partnership debts, and private funds to private debts, is the law; *Woodrop v. Ward, exec.*, 3 Desauss. R. 203; *Hall v. Hall*, 2 McC. C. R. 302; *Tunno v. Trezevant*, 2 Desauss. R. 270; *Egbert et als, v. Wood et als.*, 3 Paige's C. R. 517; *Murrell et al. v. Neill et al.*, 8 How. R. 414; *Emanuel v. Bird, adm'r*, 19 Ala. R. 596; *McCulloch v. Dashiell*, 1 Har. & Gill's R. 96; *Cleghorn v. The Insurance Bank of Columbus*, 9 Geo. R. 319; *Payne v. Matthews*, 6 Paige's C. R. 20; *Jackson v. Cornell et al.*, 1 Sandf. C. R. 348; *Wilder et als. v. Keeler et als.*, 3 Paige's C. R. 167; but in the case of *Bell et als., exec's, v. Newman, adm'r*, 5 Serg. & Raw. R. 78, it was decided, that when a surviving partner dies indebted to partnership and separate creditors, and leaving in the hands of his administrator joint property, and also separate property, the separate creditors shall receive as much out of the separate property as joint creditors receive from the portion of such separate partner in the joint property, and then the balance of the separate property shall be divided among them pro rata; and in *Emanuel v. Bird, adm'r, supra*, it was held, that when surviving partners are insolvent, and there is no joint fund to which the partnership creditors may resort, they are entitled to share in the assets of the deceased partner *pari passu* with his separate creditors; and see *McCulloch v. Dashiell*, 1 Har. & Gill's R. 96; the mere insolvency of a firm is sufficient to defeat an attachment made by a creditor of one of the firm, although the

paid in full. But if any creditor has a joint and several security, which would enable him, at law, to sue any partner severally, he may, at his option, prove his debt against the separate estate of any such partner instead of against the firm jointly (*g*); but he cannot prove against both together (*h*). The rule that the joint assets of the firm are in the first place liable to the partnership debts applies equally where there has been a change in the partnership previous to the bankruptcy. The stock handed over to the new firm is primarily liable to all the debts incurred by them; and the creditors of the old firm must [*243] first have recourse to such assets, if any, *as may still belong to the old firm, and cannot touch the property of the new partnership till all its creditors have been fully paid (*i*). The addition or withdrawal of a partner to or from a firm in difficulties may thus occasion serious detriment to its creditors.

The liability to the debts of a partnership may be incurred by being an ostensible partner, although no share of the profits be received. Thus if a person allow his name to be used as one of a firm (*k*), or to be painted over the door of a shop (*l*), he will be liable to the debts of the firm; for credit may thus be given to the firm on the strength of his character as a solvent person. On the same principle, if a person have once been known to be a partner in the firm (*m*), his liability to its debts will continue after his withdrawal, unless he takes proper means to inform the creditors that he has ceased to be a partner (*n*).

(*g*) *Ex parte Hay*, 15 Ves. 4.

(*h*) *Ex parte Bevan*, 10 Ves. 107; *Ex parte Husbands*, 2 Glyn & Jam. 4.

(*i*) *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Glyn & Jam. 96; *Ex parte Janson*, 3 Mad. 229.

(*k*) *Parkin v. Carruthers*, 3 Esp. 248; *Young v. Axtell*, cited 2 H. Black. 242.

(*l*) See *M'Iver v. Humble*, 16 East, 169, 174.

(*m*) *Evans v. Drummond*, 4 Esp. 89; *Brooke v. Enderby*, 2 Brod. & Bing. 79; * 4 Moore, 501; * *Carter v. Whalley*, 1 Barn. & Adol. 11.*

(*n*) *Godfrey v. Turnbull*, 1 Esp. 371; *M'Iver v. Humble*, 16 East, 169.

joint creditors have commenced no action see also, *Dahlgreen, adm'r, v. Duncan et al.*, 7 Smed. & Mar. R. 280.
 for the recovery of their debts; *Commercial Bank v. Wilkins*, 9 Maine R. 28; but In the case of *Brinkerhoff v. Marvin*, 5 in New York, by statute, even in cases of Johns. C. R. 320, it was held, that "where insolven-
 cy, &c., a joint creditor may proceed against the separate property of an each of two partners, the partnership property will be bound to the same extent as
 absconding debtor; In the matter of *Chipman*, 14 Johns. R. 217; In the matter of if the amount of both judgments had been
Smith, 16 Id. 102; *Robbins et als. v. included in a joint judgment for the whole*
Cooper et als., 6 Johns. C. R. 186; and against both parties."

But the circumstance of the name of a deceased partner remaining in the firm will not render his estate liable to the debts of the survivors (*o*). And if a trader direct by his will that his trade shall be carried on by his executor, the executor, who ostensibly carries on the trade, will be liable for the debts he may thereby incur as fully as if he were carrying on the trade for his own benefit (*p*); but so much only of the estate of the testator will be liable to such debts as he may have *directed to be employed in the business (*q*). The rest of the testator's estate is held to be exempt, on the ground of the [244] great inconvenience which would arise from holding it liable after its distribution amongst the legatees. But in strict principle, this exemption is at variance with the rule next stated, that a liability is incurred by any participation in the profits.

A liability to the debts of a partnership is also incurred by a participation in the profits, although the circumstance of such a participation may be unknown to the creditors (*r*). Thus if a person place money in a partnership (*s*), or leave it there on retiring (*t*), with a stipulation to have a compensation for it, under whatever name, subject to abatement or enlargement as the profits may fluctuate, he will be liable as a partner. If, however, he leaves no money in the concern, but is to receive a compensation for his services or otherwise, a nice distinction is then drawn between taking a share of the profits as such, and taking a per-centage upon, or a salary varying with the profits. He who takes a share of the profits as such is liable as a partner (*u*); but he who takes an equivalent in the shape of per-centage or salary, though varying with the profits, escapes the liability (*x*)(1).

(*o*) *Vulliamy v. Noble*, 3 Mer. 614; *Webster v. Webster*, 3 Swanst. 490, n.

(*p*) 10 Ves. 119. And at law he will be liable, though his name do not appear. *Wightman v. Townroe*, 1 Mau. & Selw. 412.

(*q*) *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, Buck, 202; *Cutbush v. Cutbush*, 1 Beav. 184; *Re Butterfield*, 11 Jurist, 955; *Kirkman v. Booth*, 11 Beav. 273.

(*r*) *Beckham v. Drake*, 9 Mee. & Wels. 79; * 11 Mee. & Wels. 315.*

(*s*) *Grace v. Smith*, 2 Wm. Black. 998, 1001.

(*t*) *Re Colbeck*, Buck, 48.

(*u*) *Ex parte Rowlandson*, 1 Rose, 89, 91; *Barry v. Nesham*, 3 C. B. 641; * see, however, *Rawlinson v. Clarke*, 15 Mee. & Wels. 292.*

(*x*) *Ex parte Hamper*, 17 Ves. 403; *Pott v. Eyton*, 3 C. B. 32; * *Stocker v. Brockelbank*, 3 Mac. & Gord. 250.

(1) Individuals who have neither a mutual interest in the capital invested in business, nor are mutually to share the losses that may happen, cannot be partners,

[*245] The circumstance that an investment of capital in any *business with a view to a participation in the profits, renders the

Lowry v. Brooks, 2 McCord's R. 421; but, where the right of a person to receive profits proceeds from his having an interest in the capital, it will constitute him a partner; *Ogden, adm'r v. Astor et al.*, 4 Sandf. S. R. 311; *Vassar et als. v. Camp et al.*, 14 Barb. S. R. 341; it is not essential, however, that one should have a property in the capital, to make him such, *Hodges v. Daves & Co.*, 6 Ala. R. 217; *Dob et al. v. Halsey*, 16 Johns. R. 34; for a partnership may be formed by capital furnished by one, and skill and labour by another, provided the profits be divided between them, not as a compensation to the one who has bestowed his skill and labour, but as profits; *Everett v. Coe*, 5 Denio's R. 180; *Simpson et al. v. Feltz*, 1 McCord's R. 218; neither is it necessary, in order to be partners, that all should have an equal interest; *Hodgman v. Smith*, 13 Barb. S. R. 302; *Motly v. Jones et al.*, 3 Ired. C. R. 144.

And one who contracts for a share of the profits of a concern, as profits, will be a partner; *Chase, adm'r. v. Barrett et als.*, 4 Paige's C. R. 148; *Price & Co. v. Alexander & Co.*, 2 Greene's R. 127; *Denny et al. v. Cabot et al.*, 6 Metc. R. 89; *Judson et al. v. Adams, &c.*, 8 Cush. R. 562; *Griffith & Co. v. Buffam et al.*, 22 Vt. R. 181; *Heimstreet v. Howland*, 5 Denio's R. 68; *Wadsworth v. Manning et als.* 4 Md. R. 59; *Barrett v. Swann et als.*, 17 Maine R. 180; *Doak v. Swann et al.*, 8 Id. 170; *Cox et al. v. Delano*, 3 Dev. R. 89; *Holt & Co. v. Kernodle*, 1 Ired. R. 202; *Brockaway v. Burnap*, 16 Barb. S. R. 309; *Cat-skill Bank v. Gray*, 14 Id. 472; *Belknap et al. v. Wendell*, 1 Fost. R. 175; *Pattison et als. v. Blanchard*, 1 Seld. R. 186; *Hodgman v. Smith*, 13 Barb. S. R. 302; *Emanuel v. Draugher et al.*, 14 Ala. R. 306; *Hodges v. Dawes & Co.*, 6 Id. 217; *Simpson et al. v. Feltz*, 1 McCord's C. R. 218; *Solomon v. Solomon, exe'x.*, 2 Kelly's R. 18; *Bowman et als. v. Bailey*,

10 Vt. R. 170; *Boardman v. Keeler et al.*, 2 Id. 65; *Kellogg v. Griswold*, 12 Vt. R. 291; *Gregory et al. v. Dodge et al.*, 14 Wend. R. 593; *Noyes v. Cushman et als.*, 25 Vt. R. 396;—or, in other words, they will be co-partners, when each has such an interest in the profits, as will entitle him to an account, and give him a specific lien on the fund for the payment of the balance of his account; *Champion v. Bostwick*, 18 Wend. R. 580, S. C. 11 Id. 571; *Conkling et al. v. The Washington University et al.*, 2 Md. C. Decs., 497; *Pierce, adm'r et al. v. Tiernan et als.*, 10 Gill & Johns. R. 253; *Hodges v. Dawes & Co.*, 6 Ala. R. 217; *Hodges v. Hollman*, 1 Denio's R. 50; *Bowman et al. v. Bailey*, 10 Vt. R. 170.

Where, however, a person is to receive, as wages, a compensation graduated according to a per centage of the profits, it will not make him a partner; *Nutting v. Colt*, 3 Halst. C. R. 539; *Perrine v. Han-kinson*, 6 Halst. R. 181; *Ogden, adm'r v. Astor et als.*, 4 Sandf. S. R. 311; *Burkle v. Eckart*, 1 Denio's R. 337; *Price & Co. v. Alexander & Co.*, 2 Greene's R. 427; *Ambler v. Beverly*, 6 Vt. R. 119; *Baxter et al. v. Rodman*, 3 Pick. R. 435; *Denny et al. v. Cabot et al.*, 6 Metc. R. 89; *Dunham v. Clayton*, 1 Barr's R. 255; *Potter v. Moses et al.* 1 R. I. R. 430; *Bartlett v. Jones*, 2 Strobh. R. 471; *Coffin v. Jenkins*, 3 Story's R. 108; *Clement v. Hadock*, 13 N. H. R. 190; *Bowman et als. v. Bailey*, 10 Vt. R. 170; *Boardman v. Keeler et al.*, 2 Id. 65; *Wilkinson v. Jett*, 7 Leigh's R. 115; *Norment v. Hall*, 1 Hump. R. 324; *Kellogg v. Griswold*, 12 Vt. R. 291; *Ambler v. Bradley*, 6 Vt. R. 119; *Shropshire v. Shepherd*, 3 Ala. R. 733; *Newman et al. v. Bean*, 1 Fost. R. 93; *Rice v. Austin*, 17 Mass. R. 205; *Vanderburgh v. Hall et al.*, 20 Wend. R. 70; *Emanuel v. Draugher et al.*, 14 Ala. R. 306; *Hodges v. Dawes & Co.*, 6 Id. 217; *Loomis v. Marshall*, 12 Conn. R. 77; *Ross v. Drinker*, 2 Hall's R. 415; *Thompson v. Snow et al.*, 4 Greenl.

person investing liable to the debts of the business to the whole extent of his fortune, appears to have an injurious operation. The occasional

R. 264; *Turner v. Bissell et al.*, 14 Pick. R. 194; *Moore v. Smith*, 19 Ala. R. 774; *Reed v. Murphy et al.* 2 Greene's R. 574; *Champion et als. v. Bostwick*, 18 Wend. R. 580, S. C. 11 Id. 571; *Bull v. Schuberth*, 2 Md. R. 38. That there is a distinction between a sharing of the profits indefinitely, and the taking of a percentage of the profits, is undoubtedly the law of this country, as it is also that of England, but it is a matter of great difficulty to determine where the profits as wages end, and the profits, as profits begin; thus, Wilde, J., in *Blanchard v. Coolidge*, 22 Pick. R. 154, says, "But there is a distinction between an agreement to share the profits of a trade indefinitely, as profits, and an agreement with an agent to allow him a certain share of the profits, as a compensation for his services." So too, this delicate difference is commented upon by Chief Justice Gibson, in *Miller v. Bartlet et al.*, 15 Serg. & Raw. R. 137, in the following words: "How a commission on profits can be distinguished from an interest in the profits, as such, I am at a loss to comprehend. The profits cannot be ascertained before the partnership account is settled, and then a party, under claim to commissions, is entitled to what? To a compensation equal in amount to so many hundredths of the sum of the profits. He is said not to have a specific interest in the profits as such. He has indeed no lien or specific demand on the particular fund as a *corpus*; but neither has a partner who is admitted to be so; profits being an incorporeal essence, and without specific existence before they are received and enjoyed. It is impossible to discover any difference but what is found in the terms, between a dividend and a commission; yet this difference, flimsy as it is, seems to be firmly established;" and again, in *Dunham v. Rogers*, 1 Barr's R. 262, the same Judge remarks, "it has been so often and so invariably ruled in England and Ame-

rica, that a commission on profits is not such an interest in the concern as constitutes partnership, that the point is at rest. What staggers the mind, in this instance, is the apparent shallowness of the distinction, when it is considered that a commission of fifty per cent. is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle, and that whatever be the proportion, the relation produced by a compensation in the form of a commission is in every instance the same." And see the case of *Pierson v. Steinmyer et als.*, 4 Richard, R. 309, where Judge Wardlow, says, "an agent might stipulate that he might receive for his services a sum equal to a certain share of the profits of a house owned by neighbours of his employer. * * * As profits usually arise in dollars, there is, of course, frequent confusion between a share of the profits as profits, and a sum measured by a share of the profits; and the distinction becomes shadowy, difficult of application, and liable to be perverted to purposes of fraud and unfair dealing."

An agreement that each party shall pay his own losses, will not constitute a partnership, for they must mutually share each others losses; but under such a state of circumstances they may be liable to third persons, as partners, *Heckert v. Fegely*, 6 Wat. & Serg. R. 139. Where upon agreement, one was to furnish a circular saw mill, and hands and stock to saw, and another was to furnish logs and feed for the hands and stock, and the lumber was to be divided equally between them, it was held that they were not partners, *Stoalings v. Baker et al.*, 15 Misso. R. 481; but, "where two persons agreed to burn lime on shares, one to fill the kiln with stones and the other to burn the kiln and furnish the necessary wood for the purpose, the lime to be equally divided be-

benefit which the creditors may derive from ransacking the estate of a sleeping partner, appears to be counterbalanced by the loss sustained

tween them, it was held, that a technical partnership existed between the parties."

What constitutes a partnership is a question of law—whether one exists is a question of fact, *Gilpin v. Temple et al.*, 4 Harring. R. 192. But a partnership may exist as to third persons, where it does not exist between the parties themselves; thus, in *Hazzard v. Hazzard*, 1 Story's R. 273, Judge Story uses the following language: "it is necessary to take notice of a well known distinction between cases, where, as to third persons there is held to be a partnership, and cases where there is a partnership between the parties themselves. The former may arise between the parties by mere operation of law, against the intention of the parties; whereas, the latter exists only when such is the actual intention of the parties. Thus, if A and B should agree to carry on any business for their joint profit, and to divide the profits equally between them, but B should bear all the losses, and should agree that there should be no partnership between them; as to third persons dealing with the firm, they would be held partners, though *inter se*, they would be held not to be partners." In speaking of the same subject, Chief Justice Ruffin, in *Holt & Co. v. Kernodle*, 1 Ired. R. 202, remarks, "as to third persons, who may deal with the firm, a partnership may arise, upon a principle of public policy, so as to bind a person for all the liabilities of a firm, and, indeed, make him a party to all its contracts, although that person bring into the business neither effects nor services, but merely lend his name as a partner, or otherwise hold himself out to the world as such. * * *

The ordinary test, however, of a person being a partner, is his participating in the profits of the business; and we believe there can be no instance imagined where there is to be a participation in them, as profits, in which every person having a right to share in them, is not thereby ren-

dered a partner to all intents and purposes. It is so between the parties themselves; because the one of them does not look to the other, personally, for restoring to him his capital, or remunerating him for his labour; but each looks to the assets or joint fund, for those purposes, and ascertains his interest by taking an account of the concern. Much more does sharing in the profits constitute a partnership as to the rest of the world, because, * * * the party takes from the creditors a portion of that fund, which is the proper security for the payment of their debts." Again, in the case of *Gill et als. v. Kuhn*, 6 Serg. & Raw. R. 337, which was a suit between partners, it was said by Chief Justice Gibson, "That there is a distinction between partnership as it respects the public, and partnership as it respects the parties, is an elementary principle of this branch of the law, so plain that its only difficulty is its application to particular cases. Where the agreement is silent, there is often room to doubt as to the precise relation in which the parties stand to each other, and then a joint interest in the stock is considered a discriminative circumstance; but where they explicitly declare there is to be no partnership, it is unnecessary to inquire further; for among themselves—the law permits them to determine their respective interests by their own stipulations: it is a matter with which third persons have no concern. * * *

Hence the invoices, bills of sale, circular letter, and receipt-book, given in evidence to prove that a joint business had been carried on, which would have a decisive influence on a question of liability to third persons, must be laid out of the case here." And see, *Kerr v. Potter*, 6 Gill's R. 404; *Sylvester et al. v. Smith*, 9 Mass. R. 119; *Coterill v. Vandusen et als.*, 22 Vt. R. 511; *Stearns v. Haven et als.*, 12 Id. 540; *Markham's exec. v. Jones*, 7 B. Mon. R. 486; *Buckingham*

by the community by the absence of the large amount of capital, which would be invested in trade, if the liability incurred was limited to a given amount. The greatest advantage, however, of allowing a limited liability, would probably be the improved tone which would indirectly be given to the whole trading community. The risk of utter ruin is a great temptation when it becomes imminent; and even when it is distant and slight, it is yet sufficient to keep out of the class of traders many persons, whose education and habits would render their accession to the commercial community a great advantage to that body. The system of partnership with limited liability has long been known on the continent under the name of partnership *en commandite*; but in our own country it cannot be obtained without an act of parliament, or letters-patent from the crown (1). It would no doubt be very

v. Burgess et al., 3 McL. R. 364; *Blanchard v. Coolidge*, 22 Pick. R. 154; *Heckert v. Fegely*, 6 Wat. & Serg. R. 139; *Kellogg v. Griswold*, 12 Vt. R. 291; *Osborne v. Brennan*, 2 N. & McCord's R. 427; *Motley v. Jones et al.*, 3 Ired. C. R. 144; *Bull v. Schubert*, 2 Md. R. 38; *Pierson v. Steinmyer et al.*, 4 Richard. R. 309; *Cutter v. The Estate of Thomas*, 25 Vt. R. 78; *Mathews v. Felch et al.*, Id. 538.

(1) In Article 2810, of the Civil Code of Louisiana, partnership *in commendum*, is thus defined; "Partnership *in commendum* is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more."

Authority for the formation of this species of partnership, is given by statute in most of the States of the Union, thus:

In Pennsylvania, "Limited partnerships for the transaction of any agricultural, mercantile, mechanical, mining, and transporting of coal, or manufacturing business, within this state, may be formed by two or more persons, upon the terms, with the

rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this act shall not be construed to authorize any such partnership for the purpose of banking or making insurance. Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute in actual cash payments, a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital. The general partnership only shall be authorized to transact business and sign for the partnership, and to bind the same." *Purd. Dig.* (1853), p. 542, &c.

By an act of the 4th of December, 1827, secs. 1, 2 & 3, *New York Revis. Stats.* Vol. 2, p. 49, &c., "Limited partnerships for the transaction of any mercantile, mechanical, or manufacturing business, within this state, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this title shall not be construed to authorize any such partnership for the purpose of banking or making insurance. Such partnerships may consist

unadvisable to damp that spirit of commercial enterprise by which this country is pre-eminently distinguished. But the limitation of the liability of railway shareholders has not perceptibly diminished railway enterprise; and it is conceived that the permission to limit the responsibility of capitalists embarking in trade, though it might give a check to reckless trading, would increase rather than diminish the true commercial prosperity of this country, in consequence both of the amount of capital that would be employed, and of the class of men that would employ it.

When the relation of partners has been established between two or [*246] more persons, either ostensibly or by *participation in profits, each incurs liability from the acts and dealings of the other in the ordinary course of business. For any one partner may buy,

of two or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law; and of one or more persons who shall contribute, in actual cash payments, a specific sum as capital, to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond the fund so contributed by him or them to the capital. The general partners, only, shall be authorized to transact business and sign for the partnership, and to bind the same."

The Revis. Stats. of Mass. (1836), p. 304, sec. 1 & 2, contain a provision of this subject in the following words: "Limited partnerships, for the transaction of mercantile, mechanical or manufacturing business within this state, may be formed by two or more persons, upon the terms and subject to the conditions and liabilities, prescribed in this chapter; but nothing contained in this chapter shall authorize such partnerships for the purpose of banking or insurance. The said partnerships may consist, of one or more persons, who shall be called general partners, and shall be jointly and severally responsible, as general partners now are by law, and of

one or more persons, who shall contribute to the common stock a specific sum, in actual cash payment, as capital, and who shall be called special partners, and shall not be personally liable for any debts of the partnership, except in cases herein-after mentioned."

In Maryland there is in addition a proviso that "the number of special partners shall in no partnership exceed six." Dorsey's Ls. of Md. Vol. II., pp. 1228, &c.

For the statutes of the several States, see Thompson's Dig. of the Ls. of Fla. p. 230, &c.; An Act of California, entitled "An Act to authorize the formation of Limited Partnerships," approved, Apr. 4, 1850; Stats. of S. C., Vol. VI., p. 578, &c.; "An Act to encourage Domestic Manufactures, (passed, Feb. 3, 1842,) Ls. of Tenn. Supplem. (1846), p. 216, &c.; Ls. of Dela. Revis. Code, (1852), p. 185, &c.; How. & Hutch. Stat. Ls. of Missi. p. 378, &c.; Dig. of the Stats. of Ark. p. 764, &c.; New Dig. of the Ls. of Geo., by T. R. R. Cobb, (1851), p. 585, &c.; Code of Va. (1849), p. 583, &c.; Revis. Stats. of Vt. (1839), p. 369, &c.; Clay's Ala. Dig. p. 389, &c.; Revis. Stats. of Maine, p. 264, &c.; Elmer's Dig. of the Ls. of N. J.; p. 376, &c.

sell (*y*), or pledge goods (*z*); draw (*a*), accept (*b*), or indorse (*c*) bills of exchange and promissory notes; give guarantees (*d*), receive moneys (*e*), and release or compound for debts (*f*) in the name (*g*) and on account of the firm, in the ordinary course of business (*i*). Each

(*y*) *Hyat v. Hare*, Comb. 383; *Lambert's case*, Godbolt, 244.

(*z*) *Reid v. Hollinshead*, 4 B. & Cress. 867.*

(*a*) *Smith v. Jarvis*, 2 Lord Raymond, 1484; *Re Clarke*, Ex parte Buckley, 14 Mee. & Wels. 469; * 1 Phil. 562.

(*b*) *Pinkney v. Hall*, 1 Salk. 126; 1 Lord Raym. 175; *Lloyd v. Ashby*, 2 B. & Adol. 23.*

(*c*) *Swan v. Steele*, 7 East, 210; *Vere v. Ashby*, 10 Barn. & Cress. 288.*

(*d*) Ex parte Gardom, 15 Ves. 286; see *Halesham v. Young*, 5 Q. B. 833.*

(*e*) *Duff v. East India Company*, 15 Ves. 197, 213.

(*f*) *Per Lord Kenyon*, 4 T. Rep. 519; per Best, C. J., 10 Moore, 393.*

(*g*) *Kirk v. Blurton*, 9 Mee & Wels. 284.*

(1) One partner may bind the firm by a parol contract, in business relating to the partnership; *Weaver v. Tapscott*, 9 Leigh's R. 432; *Sale v. Dishman's exec's*, 3 Id. 548; *McCullough v. Sommerville*, 8 Id. 415; *Doak v. Swann et al.*, 8 Maine R. 170; *The Man. & Mech. Bank v. Gore et al.*, 15 Mass. R. 81; *Boardman v. Gore et al.*, Id. 339; *Galloway v. Hughes et al.*, 1 Bail. R. 561; *Nichols v. Hughes et al.*, 2 Id. 109; *Livingston v. Roosevelt*, 4 Johns. R. 265; *Winship v. The Bank of the United States*, 5 Pet. R. 529; *Storer v. Hinkley et al. exec's*, Kirby's R. 147; but "the purpose for which the partnership was created, and the extent of the authority of the individual members, is not to be limited by the articles under which their connection was formed, but is to be ascertained, rather from the character of their dealings, and manner in which they hold themselves out to the world;" hence, in the case of *Catlin et al. v. Gilder's exec's*, 3 Ala. R. 544, it having been testified that the firm of Catlin, Peeples & Co. dealt in dry goods, and groceries, and were in the habit of trading in anything on which they could make money, it was held, that "taking this statement as literally true, and it cannot be questioned, that Catlin might, during the continuance of the partnership, have purchased hogs, or other stock, on

account of the firm." A partnership is bound by the fraud of one of its members, in all matters relating to the business of the firm; *Beach v. The State Bank*, 2 Cart. (Inda.) R. 488; *Boardman v. Gore et al.*, 15 Mass. R. 331; *Reynolds v. Waher's heir & adm'r.*, 1 Wash. (Va.) R. 164; *Nesbit et als. v. Patton et als.*, 4 Raw. R. 120; for, "by forming the connexion, the partners publish to the world their confidence in each other's integrity and good faith, and impliedly agree to be responsible for what they shall respectively do within the scope of their partnership business." *Hawkins et al. v. Appelby et al.*, 2 Sandf. S. R. 428.

But one partner cannot bind the firm by deed, or instrument under seal; *Donaldson v. Kendall et als.*, 2 Geo. Decs. 227; *Clement v. Brush*, 3 Johns. Cas. 181; *Green et al. v. W. & T. Beals*, 2 Caines' R. 254; *Napier v. Catron et als.*, 2 Hump. R. 534; *Anderson et al. v. Tompkins et al.*, 1 Brockenb. R. 463; *Andrew's heirs, &c. v. Brown's adm'r et al.*, 21 Ala. R. 437; *Davidson et al. v. Kelly*, 1 Md. R. 501; *Snyder v. May et al.*, 7 Har. R. 235; *Pierce v. Cameron et als.*, 7 Richard. R. 114; *Chamberlain et al. v. Madden*, Id. 395; and hence, one partner cannot dispose of the partnership real estate, *Piatt v. Oliver et als.*, 3 McL. R. 27; but where a partner has a right to dispose of the

partner is also answerable for the fraud of his copartner in any matter relating to the business of the partnership (*h*). And in like manner notice of any matter relating to the partnership, if given to one partner, is constructively notice to them all (*i*). And any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on any creditor (*j*) who may not have notice of it (*k*). If, however, the transaction be not in the ordinary course of the business of the partnership, the other partners will not be liable [*247] as such in respect of it. Thus one partner *cannot bind the firm by a submission to arbitration (*l*), or by confessing a judgment (*m*); and one partner has ordinarily no authority to execute a deed in the names of the others so as to bind the partnership (*n*). So a farmer carrying on his business in partnership with another would not be liable on a bill of exchange drawn by his partner in the name of the partnership (*o*); neither would a solicitor be liable on a bill drawn by his partner in the name of his firm, though given to secure a partnership debt (*p*);

(*h*) *Willet v. Chambers*, Cowp. 814; *Stone v. Marsh*, 6 Barn. & Cress. 551; * *Lavell v. Hicks*, 2 You. & Coll. 481; *Blair v. Bromley*, 5 Hare, 542; 2 Phil. 354.

(*i*) Per Lord Ellenborough, 1 Mau. & Selw. 259.

(*j*) *Waugh v. Carver*, 2 H. Black. 235; *South Carolina Bank v. Case*, 8 Barn. & Cress. 427; * *Hawken v. Bourne*, 8 Mee. & Wels. 703, 710.*

(*k*) *Minnit v. Whinery*, 5 Bro. Parl. Cas. 489.

(*l*) *Stead v. Salt*, 3 Bing. 101, * S. C. 10 J. B. Moore, 389.

(*m*) *Hambidge v. De La Crouee*, 3 C. B. 742.*

(*n*) *Harrison v. Jackson*, 7 T. Rep. 207; see *Burn v. Burn*, 3 Ves. 573, 578.

(*o*) Per Littledale, J., 10 Barn. & Cress. 138.*

(*p*) *Hedley v. Bainbridge*, 3 Q. B. 316.*

assets of the firm as surviving partner, though his deed to a purchaser of real estate will not convey a legal title, yet it will transfer an equitable title, through which he may compel the heir to convey the estate, *Andrew's heirs, &c. v. Brown's adm'r et al.*, 21 Ala. R. 437. So, one partner cannot by a confession of judgment bind his co-partner, unless actually brought into court by service of process on himself and co-partner; *Crane et al. v. French et als.*, 1 Wend. R. 311; *Morgan et al. v. Richardson*, 16 Misso. R. 409; and a service of process on one of several partners is not equivalent to service on all. *Rice v. Doniphan et al.*, 4 B. Mon. R. 123.

After the dissolution of a firm, the admissions of one of the partners cannot be received in evidence against his co-partners; *Hamilton v. Summers*, 12 B. Mon. R. 14; *Daniel v. Nelson*, 10 Id. 316; *Draper v. Bissel et al.*, 3 McL. R. 275; *Bispham v. Patterson et al.*, 2 Id. 87; *Robinson et al. v. Taylor et al.*, 4 Barr's R. 242; *Berryhill v. McKee*, 1 Hump. R. 31; unless the one making such admissions, has an express, or an implied authority to settle the business of the firm; *Draper v. Bissel et al.*, 3 McL. R. 275; *Robinson et al. v. Taylor et al.*, 4 Barr's R. 242.

for bill transactions form no part of the ordinary business of either farmers or solicitors. Again there is no right or power implied by law in any of the directors of a joint-stock company to bind the company by drawing or accepting bills or notes (*q*); and in like manner notice of any matter relating to the business of a joint-stock company given to any member, even a director, is not constructive notice to the company itself (*r*); for joint-stock companies are essentially different from ordinary partnerships. It is not necessary that the directors should have any other power to bind the company by bills or notes than such as may be conferred on them by the charter or deed of settlement (*s*); and the business of such companies is always carried on at an office for the purpose, and is not, like that of ordinary partnerships, confided to any one individual member.

*The liability of a shareholder in a joint-stock company to the debts of the company has been already noticed. It varies, [*248] as we have seen, according as the company is incorporated under a special act (*t*), or under the general act for the incorporation of joint-stock companies (*u*), or under the act for the regulation of joint-stock banks (*x*). The mere circumstance, however, of a person allowing his name to be published as a provisional committeeman of a projected joint-stock company (*y*) does not confer on the solicitor or secretary of the intended company, or on any one else, implied authority to pledge the credit of such person for goods supplied to the company, or work done on its account (*z*). For to agree to become a member of a committee is merely to agree to become one of a body, to whom others have committed a particular duty, and does not constitute an agreement to share with the other members of that body in profit or loss, which is the characteristic of a partnership (*a*). Nor does the mere acceptance of shares and payment of a deposit on them, without any

(*q*) *Dickinson v. Valpy*, 10 B. & Cress. 128; * *Bramah v. Roberts*, 3 N. C. 963.

(*r*) *Powles v. Page*, 3 C. B. 16; * *Martin v. Sedgwick*, 9 Beav. 333.

(*s*) See stat. 7 & 8 Vict. c. 110, s. 45; c. 113, s. 22.

(*t*) See stat. 8 & 9 Vict. c. 16, s. 36, ante, p. 168.

(*u*) Stat. 7 & 8 Vict. c. 110, ss. 66-68; ante, p. 172.

(*x*) Stat. 7 & 8 Vict. c. 113, ss. 7-10, ante, p. 174.

(*y*) See ante, p. 171.

(*z*) *Reynell v. Lewis*, 15 M. & W. 517; * *Barker v. Stead*, 3 C. B. 946; * *Bailey v. Macaulay*, 13 Q. B. 815.*

(*a*) 15 Mee. & Wels. 529.*

further act, render a provisional committee-man liable to the creditors of the projected company (*b*).

Assignees in bankruptcy, with the leave of the court first obtained, upon application to such court, but not otherwise, may commence, prosecute or defend any action at law or suit in equity which the bankrupt might have commenced or prosecuted or defended; and with the like leave of the court, after notice to such creditors, *and [*249] subject to such condition (if any) as to obtaining the consent of creditors, or any proportion of them, as the court shall think fit to direct, the assignees may compound, or give time, or take security, for the payment of any debts due to the bankrupt's estate, and may submit to arbitration any dispute relating to the bankrupt's estate (*c*). And any agreement of reference to arbitration made by the assignees may be made a rule of any of her majesty's superior courts of law at Westminster, whether such agreement contain a clause to that effect or not (*d*). The assignees of insolvents cannot bind the creditors by any of the above acts, without the consent in writing of the major part in value of the creditors present at a meeting duly convened, nor without the approbation of the court or one of the commissioners (*e*). But as the consent of creditors is required only for their protection, the want of such consent is no defence to any suit instituted by the assignees of any insolvent (*f*).

(*b*) *Bright v. Hutton*, 3 H. of L. Cas. 341, overruling *Upfill's case*, 2 H. of L. Cas. 674.

(*c*) Stat. 12 & 13 Vict. c. 106, s. 153.

(*d*) Sect. 154.

(*e*) Stat. 1 & 2 Vict. c. 110, s. 51; 7 & 8 Vict. c. 96, s. 13.

(*f*) *Piercy v. Roberts*, 1 My. & Keen, 4; *Casborne v. Barsham*, 6 Sim. 317.

*CHAPTER III.

[*250]

OF A WILL.

ALL kinds of personal property may be bequeathed by will. This right, in its present extent, has been of very gradual and almost imperceptible growth; for anciently, by the general common law, a man who left a wife and children could not deprive them by his will of more than one equal third part of his personal property. If, however, he left a wife and no children, or children and no wife, he was then enabled to dispose of half, leaving the other half for the wife or for the children (*a*). This ancient rule, however, gradually became subject to many exceptions, by the customs of particular places, until the rule itself took the place of an exception and became confined to such places as had a custom in its favour. These places, in later times, were the province of York, the principality of Wales, and the city of London; as to all which places, a general power of testamentary disposition was conferred by acts of parliament of William and Mary, Anne, and George I. (*b*); and now, by the recent act for amendment of the laws with respect to wills (*c*), every person of full age is expressly empowered to bequeath by his will, to be executed as *required by the act, all personal estate to which he shall be entitled, [*251] either at law or in equity, at the time of his decease.

The ecclesiastical courts, as we shall hereafter see, very early acquired the right of determining as to the validity of wills of personal estate; and, in the exercise of this right, they generally followed the rules of the civil law. By this law, males at the age of fourteen, and females at the age of twelve, were allowed, if of sufficient discretion, to make a testament (*d*); and the same rule, accordingly, prevailed in this country with respect to wills of personal property (*e*), although, by

(*a*) 2 Black. Com. 492; Williams on Executors, pt. 1, bk. 1, ch. 1; see also 1 C. P. Cooper's Reports, p. 539.

(*b*) Stat. 4 & 5 Will. & Mary, c. 2, explained by stat. 2 & 3 Anne, c. 5, for the province of York; stat. 7 & 8 Will. III. c. 38, for Wales; and stat. 11 Geo. I. c. 18, for London. See 2 Bl. Com. 493.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3.

(*d*) Inst. lib. 2, tit. 12, s. 1; Dig. lib. 28, tit. 1, s. 5.

(*e*) 2 Bl. Com. 497.

some authorities, seventeen and even eighteen was said to be the proper age (*f*). The act for the amendment of the laws with respect to wills, has, however, now made the law uniform with respect to all wills, whether of real or of personal estate, and has enacted that no will made by any person under the age of twenty-one years shall be valid (*g*) (1).

(*f*) Co. Litt. 89 b, n. (6)

(*g*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 7.

(1) The questions, who may make a will? and, how is it to be made? are best answered by a reference to the statutory provisions of each particular State.

In Pennsylvania, "Every person of sound mind, [married women excepted,] may dispose by will of his or her real estate, whether such estate be held in fee simple, or for the life or lives of any other person or persons, and whether in severally, joint tenancy or common, and also of his or her personal estate. Any married woman may dispose, by her last will and testament, of her separate property, real, personal or mixed, whether the same shall accrue to her before or during coverture: Provided, That the said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband. And provided also, That no will shall be effectual unless the testator were, at the time of making the same, of the age of twenty-one years or upwards, at which age the testator may dispose of real as well as personal or mixed property, if in other respects competent to make a will. Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect. Provided, That personal estate may be bequeathed by a noncupative will, under the following restrictions: 1. Such will shall in all cases be made during the last sickness of the testator, and in the

house of his habitation or dwelling, or where he has resided for the space of ten days or more, next before the making of such will; except where such person shall be surprised by sickness, being from his own house, and shall die before returning thereto. 2. Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and in all cases the foregoing requisites shall be proved by two or more witnesses who were present at the making of such will. Provided, That notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his moveables, wages and personal estate, as he might have done before the making of this act. No will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the same manner as is hereinbefore provided, or by burning, cancelling, or obliterating or destroying the same by the testator himself, or by some one in his presence, and by his express direction. When any person shall make his last will and testament, and afterwards shall marry or have a child or children not provided for in such will, and die leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after born,

Personal property was anciently of so little account that a will of it might be made by word of mouth, if proved by a sufficient number of

shall be deemed and construed to die intestate, and such widow, child or children, shall be entitled to such purparts, shares and dividends of the estate, real and personal of the deceased, as if he had actually died without any will. A will executed by a single woman shall be deemed revoked by her subsequent marriage, and shall not be revived by the death of her husband." *Purd. Dig.* (1853), pp. 843, 844, 845.

In New York, "All persons except idiots, persons of unsound mind, married women, and infants, may devise their real estate, by a last will and testament, duly executed according to the provisions of this title. Every male person of the age of eighteen years or upwards, and every female not being a married woman, of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing. No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a marine while at sea. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:—1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator. The witnesses to any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his

direction, shall write his own name as a witness to the will. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses. If after the making of any will, disposing of the whole estate of the testator, such testator shall marry and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless the provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention was to make such a provision; and no other evidence to rebut the presumption of such revocation shall be received. A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage. Whenever a testator shall have a child born after the making of his will, either in his lifetime or after his death, and shall die, leaving such child so after born, unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate, as would have been descended or distributed to such child, if the father had died intestate;"

witnesses, as well as by writing; and a will made by word or mouth was termed a nuncupative testament (*h*). By the Statute of Frauds,

(*h*) Wentworth's Executors, 11 *et seq.*; Williams on Executors, pt. 1, bk. 2, ch. 2, s. 6.

N. Y. Revis. Stats., 3d ed., Vol. 2, pp. 118, 121, 124.

See also N. H. Compiled Stats. (1853,) pp. 45, 381, 401; Thompson's Dig. of the Ls. of Fla. 192, 193; Dullam's Dig. of the Ls. of Tex., pp. 244, 245; New Dig. of the Ls. of Geo., by T. R. R. Cobb, Vol. 2, p. 1128, &c.; Code of Va. (1849,) p. 516, &c.; Revis. Stats. of Vt. (839,) p. 254, &c.; Michi. Revis. Stats. p. 270, &c.; Clay's Ala. Dig. p. 596, &c.; Dorsey's Ls. of Md., Vol. 1, pp. 370, 371, 598; An Act of California, entitled "An Act concerning Wills," approved Apr. 10, 1850; Revis. Stats. of Mass. (1836,) p. 416, &c.; Revis. Stats. of Maine, p. 175, &c.; Elmer's Dig. of the Ls. of N. J., pp. 595, 599; Revis. Stats. of N. C., Vol. 1, p. 619, &c.; Morehead & Brown's Dig. of Ky. Stats., Vol. 2, p. 1537, &c.; Stats. of S. C., Vol. 5, p. 106, &c.; Caruthers & Nicholson's Stat. Ls. of Tenn., p. 706, &c.; Ls. of Del. Revis. Code, (1852,) p. 272, &c.; Stats. of O. (1841,) pp. 992, 1003; How. & Hutch. Stat. Ls. Missi. p. 385, &c.; Dig. of the Stats. of Ark., pp. 989, 993.

Nearly all the statutes on this subject require that a person should be of the age of twenty-one years, to make a will, either of real or personal estate; but in New York, as has been seen, a male of the age of eighteen, and a female who has reached sixteen, may make a will of their personalty; in Virginia, North Carolina, Kentucky, and Arkansas, any person who has attained the age of eighteen years may bequeath their personal property by will; and in Maryland and Mississippi, a female of eighteen may make a will of her real estate.

The number of witnesses required, is different in the different States. In most of them, three is required; but in Pennsylvania, New York, California, Arkansas, Ohio,

Delaware, Tennessee, Kentucky, North Carolina, Texas and Virginia, two only are necessary. The Statute of Mississippi requires three witnesses to a will of real estate, but one is sufficient to a will of personalty. In some of the States it is requisite that these should be subscribing witnesses, as in New Jersey, but it does not follow that they must all join in proving the will; Meckle *v.* Matlack, 2 Harrison's R. 86.

There is a diversity, too, as respects the making of nuncupative wills. In almost all the States they are allowed, but the statutes enjoin, that if the personal property thereby bequeathed should be beyond a certain value, they must be strictly proved in the manner pointed out in the respective acts. In Texas, this sum is fixed at \$30, and in Kentucky and South Carolina, at \$10; in New Jersey, at \$80; in Pennsylvania, New Hampshire, Alabama, Maine, and Mississippi, at \$100; in Georgia, at £30; in Vermont, North Carolina and Delaware, at \$200; in Tennessee at \$250; and in Michigan and Maryland, at \$300. But in New York, Florida, Massachusetts and Ohio, no nuncupative will can be deemed valid, unless proved as required by the statutes of those States; and in California and Arkansas, no such will can be valid unless under the value of \$500, nor unless proved as the legislative acts of those respective States demand. It is, however, expressly enacted by the statutes of the different States, that nothing therein contained shall be construed to deprive a mariner at sea, or a soldier in actual military service, from making such will as he might have done before those acts became laws.

Whether a seal is necessary to the validity of a testament, is determined by the statute of the several States.

however, a nuncupative testament, where the estate bequeathed exceeded the value of thirty pounds, was surrounded by so many requirements as to cause its complete disuse (*i*). But no provision was made for guarding the execution of a written will of personal *estate; although by the same statute (*k*) a will of real estate [*252] was required to be attested by three or four witnesses. No attestation, therefore, was required to a will of personal estate, nor was it even necessary that such a will should be signed by the testator. Thus, instructions for a will, committed to writing, given by a person who died before the instrument could be formally executed, though such instructions were neither reduced into writing in the presence of the testator nor even read over to him, have been held to operate as fully as a will itself (*l*). It was, however, provided by the Statute of Frauds, that no will in writing of personal estate should be repealed or altered by word of mouth only, except the same were, in the life of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least (*m*) (1).

By the recent act for the amendment of the laws with respect to wills, every will of personal estate must now be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of *two* or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator (*n*) (2). The act, in fact, requires the same mode of execution and attestation to every will, whether the property be real or personal. But an exception is made in favour of soldiers being in actual military service, that is, on an expedition (*o*), and of *marines and seamen, including merchant [*253] seamen (*p*), being at sea, who may dispose of their personal estate as they might have done before the making of the act (*q*); a

(*i*) Stat. 29 Car. II. c. 3, ss. 19–21, explained by stat. 4 Anne, c. 16 s. 14.

(*k*) Sect. 5.

(*l*) *Carey v. Askew*, 2 Bro. C. C. 58; S. C. 1 Cox, 241.

(*m*) Stat. 29 Car. II. c. 3, s. 22.

(*n*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, explained by stat. 15 & 16 Vict. c. 24. See *Principles of the Law of Real Property*, 167, 3rd ed.

(*o*) *Drummond v. Parish*, 8 Curt. 522. (*p*) *Morrell v. Morrell*, 1 Hagg. 51.*

(*q*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 11.

(1) See ante, p. 251, note.

(2) See ante, p. 251, note.

similar exception was contained in the Statute of Frauds (*r*). The wills of soldiers on an expedition, and of merchant seamen, may accordingly be made by an unattested writing, or by a mere nuncupative testament, or declaration of their will by word of mouth, made before a sufficient number of witnesses. But the wills of petty officers and seamen in the royal navy, and of marines and noncommissioned officers of marines, so far as relates to any wages, pay, prize money or other monies payable in respect of services in Her Majesty's navy, are required by act of parliament (*s*) to be executed in the presence of and to be attested by the captain of the ship, or certain other officers or persons mentioned in the act; and the wills of such persons are also guarded by other requisitions in order to prevent their being imposed upon (1). By the act to amend the laws with respect to wills it is also provided that no will or codicil, or any part thereof, shall be revoked otherwise than by the marriage of the testator or testatrix (which will of itself effect a revocation (*t*)), or by another will or codicil executed in the manner thereby required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is thereby required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*u*) (2).

[*254] *Connected with the subject of will is that of donations mortis causâ, which may here be noticed. A donation mortis causâ is a gift made in contemplation of death, to be absolute only in case of the death of the giver (*w*). Being a gift, it can be made only of chattels, the property in which passes by delivery (*x*); although a bond debt has, contrary to this principle (*y*), been allowed to pass by way of donation mortis causâ by delivery of the bond (*z*). An actual

(*r*) Stat. 29 Car. II. c. 3, s. 23.

(*s*) Stat. 11 Geo. IV. & 1 Will. IV. c. 20, ss. 48-51; 7 Will. IV. & 1 Vict. c. 26, s. 12, Williams on Executors, pt. 1, bk. 4, c. 4.;

(*t*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 18. See Principles of the Law of Real Property, 153, 1st ed.; 163, 2nd ed.; 170, 3rd ed.

(*u*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20.

(*w*) Inst. tit. 7, De Donationibus, cited by Lord Loughborough, in Tate v. Hilbert, 2 Ves. jun. 119; Walter v. Hodge, 2 Swanst. 99.

(*x*) See ante, p. 33; Miller v. Miller, 3 P. Wms. 356.

(*y*) Duffield v. Elwes, 1 Sim. & Stu. 244.

(*z*) Snellgrove v. Bailly, 3 Atk. 214.

(1) See ante, p. 251, note.

(2) See ante, p. 251, note.

or constructive delivery of the subject of gift to the donee is essential to a donation mortis causâ (*a*); it must also be made in expectation of the donor's decease (*b*), and must be on condition that the gift be absolute only on that event (*c*). It is no objection, however, that the donation is clogged with a trust to be performed by the donee (*d*). A donation mortis causâ is revocable by the donor during his life (*e*), and after his decease it is subject to his debts (*f*), and also to legacy duty (*g*) (1).

(*a*) Wood v. Turner, 2 Ves. sen. 431; Bryson v. Brownrigg, 9 Ves. 1; * Bunn v. Markham, 7 Taunt. 224; Ruddell v. Dobree, 10 Sim. 244; Farquharson v. Cave, 2 Coll. 356.

(*b*) Tate v. Hilbert, 2 Ves. jun. 111; 4 Bro. C. C. 286.

(*c*) Edwards v. Jones, 1 My. & Craig, 226; Staniland v. Willott, 3 Mac. & Gord. 664.

(*d*) Blount v. Burrow, 4 Bro. C. C. 72; Hills v. Hills, 8 Mee. & Wels. 401.*

(*e*) 7 Taunt. 232.*

(*f*) 1 P. Wms. 406; 2 Ves. sen. 434.

(*g*) Stat. 36 Geo. III. c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4.

(1) An endeavor to determine the nature and requisites of donations *causa mortis*, by comparing the English and American decisions with the doctrines and principles of the civil law, must produce great embarrassment, and perhaps end in confusion, as will be seen by a review of the two cases of Wells v. Tucker, 3 Bin. R. 370, and Nicholas v. Adams, 2 Whart. R. 17; in contrasting these cases, it appears that in Pennsylvania this subject has undergone considerable modification, as regards the sentiments entertained of its qualities and attributes; in the former, Chief Justice Tilghman says, "*A donatio causa mortis* is a gift of a personal chattel, made by a person in his last illness, subject to an implied condition, that if the donor recovers, the gift shall be void. So also it shall be void if the donee dies before the donor. In this, and some other circumstances, (being subject to the debts of the donor, &c.,) it is in the nature of a legacy * * * It is a wise principle of our law, that the delivery is essential, because delivery strengthens the evidence of the gift. Too much care cannot be taken in insisting on the most convincing evidence in cases of this kind, for these donations do in effect amount to a revocation *pro tanto*, of written wills; and not being subject to the forms prescribed for nuncupa-

tive wills, they are certainly of a dangerous nature. Now let us consider the delivery which was made in this case. In the first place it was not to the donee, but to the donor's wife to be delivered over. There is no objection to this mode of delivery. Whether made to the donee immediately, or to another for his use, is immaterial * * * Without absolutely committing myself, I incline to the opinion, that in this, as in several other particulars, it partakes of the nature of a legacy, and is revocable * * * Upon the whole, then, the donation was perfect; it was made in the testator's last illness, and accompanied with the delivery of the bonds, which is all that the nature of the case admits of." Subsequently, in the case Nicholas v. Adams, Chief Justice Gibson, after quoting from the Civil Laws, and saying that there is not one word of sickness from first to last, proceeds: "I would, therefore, briefly define a *donatio causa mortis* to be a conditional gift, dependent on the contingency of expected death. * * * in the *donatio causa mortis*, both are implied from the occasion. But it is certainly not necessary to be in such extremity as is requisite to give effect to a nuncupation, which is sustained from necessity merely, where the donor was prevented by the urgency of dissolution, from making a for-

The mode of operation of a will of personalty is essentially different from the operation of a will of lands in this respect, that in strictness

mal bequest. *Donatio causa mortis* is sometimes spoken of as being distinct from a gift *inter vivos*; the former having sometimes been supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me; as this gift, like every other, is not executory, but executed in the first instance, by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, or deliverance from peril. The gift is consequently *inter vivos*. All agree that it has no property in common with a legacy, except that it is revocable in the donor's lifetime, and subject to his debts in the event of deficiency. I, therefore, cannot subscribe to the doctrine, that the making of a subsequent will is conclusive evidence of the gift having not been made during such a last illness, as the law requires; and that if the degree of sickness was such as to induce an expectation of immediate death, the subsequent making of a formal will is conclusive that the donor had escaped from the peril of death, which he supposed to impend at the time of the gift; and that under these circumstances, it cannot take effect as a *donatio causa mortis*. * * * To say nothing of the fallacy, that the making of a will indicates even a respite from sickness, or the apprehension of death, a disposition by *donatio causa mortis*, is not to be disturbed by the alternation of hope and despair, dependent on the doubtful spinning of the die, but only by the turn up of life."

By the still more recent decision of Headley v. Kirby, 6 Har. R. 326, Judge Lowrie utterly repudiates the idea that the civil law can be of any practical assistance in determining the attributes of donations of this description, saying, "Though we derive the law as to *donationes mortis causa*, from the Roman lawyers, yet their rules on that subject are no guide to us in the administration of our law; for the strin-

gent severity of their law of wills, occasioned and excused larger equitable exceptions, by way of gifts in prospect of death, than can at all be sanctioned under our much more reasonable statute of wills."

What then is a *donatio causa mortis*, considered with regard to the American cases, only? Many of them define it as a gift made by a person in his last illness, subject to the implied condition, that if the donor recovers the gift shall be void; Wells v. Tucker, 3 Bin. R. 370; Weston v. Hight, 17 Maine R. 287; Grattan, adm'r, v. Appleton et als., 3 Story's R. 755; Harris v. Clark et als., exec's, 2 Barb. S. R. 94; Hebb et als., exec's, v. Hebb, exe'x, 5 Gill's R. 506; Lee v. Luther, 3 Wood. & Min. R. 524; while others say, that it must be made in expectation of death; Nicholas v. Adams, 2 Whart. R. 17; Raymond v. Sellick et als., adm'rs, 10 Conn. R. 480; Holly v. Adams, 16 Vt. R. 206; Smith, adm'r, v. Downey, adm'r, 3 Ired. E. R. 268; Dole, adm'r, v. Lincoln, 31 Maine R. 422; Huntington, exec. v. Gilmore, 14 Barb. S. R. 243; but in all of the latter cases, the donor was actually ill of the sickness of which he died; if, however, the donor is neither out of health, nor in apprehension of death, he cannot make a valid *donatio mortis causa*; Smith et al. v. Kittridge, adm'r, 21 Vt. R. 238; Sessions v. Moseley, 4 Cush. R. 87.

In all cases of gifts in expectation of death, delivery is absolutely essential; Bowers v. Hurd, adm'r, 10 Mass. R. 427; Windows v. Mitchell, 1 Murph. R. 127; Shirley v. Whithead, 1 Ired. E. R. 180; Craig v. Craig, 2 Barb. C. R. 78; Lewis v. Walker, 8 Humph. R. 508; Jones, adm'r, v. Deyer, 16 Ala. R. 221; McCraw v. Edwards et al., 6 Ired. E. R. 202; Chevallier, adm'r, v. Wilson, 1 Tex. R. 161; Hitch v. Davis et als., 3 Md. C. Decs. 266; if possible, the gift should be put into the hands of the donee; Harris v. Clark, 3 Comst. R.

the appointment of an executor was formerly essential to a will of personalty (*h*);* and, at the present day, the usual and proper method is to appoint an executor as to the personal estate; [*255]

(*h*) Wentworth's Executors, 3, 4, 14th ed.; 2 Bla. Com. 503.

98; McDowell *v.* Murdock, 1 N. & McCord's R. 239; Pennington, adm'r, *v.* Gettings, exec., 2 G. & Johns. R. 208; Windows *v.* Mitchell, 1 Murph. R. 127; Smith, adm'r, *v.* Downey, adm'r, 3 Ired. E. R. 268; Miller *v.* Jeffress et al., 4 Gratt. R. 479; but, if not capable of actual delivery, to the donee, the means of obtaining it should be delivered, Harris *v.* Clark, 3 Comst. R. 93, and other cases just cited. That an after acquired possession of the thing given, or a previous and continuing possession of it, will not dispense with the necessity of a delivery, see Miller *v.* Jeffress et al., 4 Gratt. R. 479, where Judge Baldwin says, "A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or a ring; or of the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse, in which the subject of the gift is deposited; or if the thing be in action, of the instrument by using which, the *chose* is to be reduced into possession, as a bond, or a receipt, or the like. * * * It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better. The donee, by being the debtor or bailee or trustee of the donor, in regard to the subject of the gift, stands upon no better footing than if the debt or duty were owing from a third person. A debt or duty cannot be released by mere parol, without consideration; and where there is nothing to surrender by delivery, the only result is, that in such a case, there cannot be a

donatio mortis causa; and the release, without valuable consideration therefor, must be by testament, or by some instrument of writing which would be effectual for the purpose, *inter vivos*."

But a delivery to a third person to be by him delivered over to the donee, has been held a good delivery; Wells *v.* Tucker, 3 Bin. R. 370; Bonneman, adm'r. *v.* Sidlinger et al., 15 Maine R. 429, and 21 Maine R. 185; Coutant *v.* Schuyler et als., 1 Paige's R. 316; Jones, adm'r, *v.* Deyer, 16 Ala. R. 221; Dale, adm'r, *v.* Lincoln, 31 Maine R. 422; Sessions *v.* Moseley, 4 Cush. R. 87; and in the case of Richardson *v.* Adams, 10 Yerg. R. 273, where the testator gave express direction to a residuary legatee to deliver an article of property to an individual as a gift, and such legatee promised the testator that he would deliver it, the Court of Chancery declared the legatee a trustee, and enforced a delivery of the article. But the court refused to extend this rule, and in the following case declared no trust was created, because the promise was not made to the testatrix by the residuary legatee, but by an executor, who subsequently declined acting; Sims *v.* Walker, 8 Hump. R. 503; and the delivery of any such gift, in trust for benevolent purposes, has been held void; Dole, adm'r, *v.* Lincoln, 31 Maine R. 422.

Gifts *causa mortis*, differ from those *inter vivos*, in, that they may be made to a wife, are subject to the debts of the donor, and revocable by him during his life, besides being subject to the contingency of the donee surviving the donor; Harris *v.* Clark et als., exec's, 2 Barb. S. R. 94; Wells *v.* Tucker, 3 Bin. R. 370; Meach *v.* Meach et al., 24 Vt. R. 591, though Chief Justice Gibson, in Nicholas *v.* Adams, as we have seen, denies that there is any dif-

whereas, under a devise of landed property, the lands pass at once to

ference between them at the time of the gift, where he says, "this gift, like every other, is not executory, but executed in the first instance, by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, or deliverance from peril. The gift is consequently *inter vivos*." In those respects in which these gifts differ from those *inter vivos*, they resemble legacies; thus they are subject to the debts of the donor; *Wells v. Tucker*, 3 Bin. 370; *Bonnerman, adm'r, v. Sidlinger et al.*, 15 Maine R. 429; *Harris v. Clark et als. exec's*, 2 Barb. S. R. 94; *Gaunt v. Tucker*, 18 Ala. R. 27; *Huntington, exec. v. Gilmore*, 14 Barb. S. R. 243; and they are revocable by the donor during his life, as well as given upon the implied condition, that if the donee dies before the donor, the gift shall fail; *Wells v. Tucker*, 3 Bin. R. 370; *Huntington, exec. v. Gilmore*, 14 Barb. S. R. 243; *Parker v. Marston*, 27 Maine R. 196; but they differ from legacies, in that they do not require the assent of the legal representative of the decedent, to make a good title in the donee; *Doyle, adm'r, v. Lincoln*, 31 Maine R. 422.

Negotiable securities, which pass by delivery, may be the subject of a gift in view of death; *Grover v. Grover*, 24 Pick. R. 261; *Bradley v. Hunt, adm'r*, 5 Gill & Johns. R. 58, in which last case Chief Justice Buchanan remarks: "To constitute a *donatio causa mortis*, the gift should be full and complete at the time, passing from the donor the legal power and dominion over the thing intended to be given, and leaving nothing to be done by him, or his executor, to perfect it. Hence bank notes are the subject of such gifts, they being considered as money, and the property in them passing by delivery; and so as to promissory notes payable to bearer, which pass by delivery, and the property, and legal dominion over the thing intended to be given, passing with the possession from the donor to the donee, they do not require to be sued in the name of the executor, and

nothing is necessary to be done by him to perfect the gift of the money. But not so with the delivery of a promissory note payable to order, which has been held to be insufficient to pass to the donee the money, the thing intended to be given; upon the ground that no property in it passes by delivery, and being a mere *chose in action*, it must, notwithstanding the delivery, be sued in the name of the executor. So that the gift of money is not complete at the time, the legal dominion over it remaining in the donor, and on his death, passing to his executor, without the use of whose name it cannot be perfected. This may seem to be technical; but if the rule is admitted, that a delivery of the thing intended to be given is essential to the perfection of the gift, it must follow, that a promissory note payable to order, is not capable of being the subject of a *donatio mortis causa*. And if we were at liberty to do so, we should not be disposed to relax the rule, which would be to open still wider, the door already sufficiently wide, to frauds and perjuries, and the exercise of undue influence by the artful and designing upon the weak and unwary."

By more recent decisions, however, "It seems now to be well settled, that any chose in action, whether negotiable or not, whether simple contract or specialty, if it be the contract, or promise of some other than the donor, and do not constitute any obligation upon the donor, may, by mere delivery, constitute a good gift by reason of anticipated death." *Meach v. Meach et al.*, 24 Vt. R. 291; *Brunson v. Brunson*, 1 Meigs' R. 630; *Bonneman, adm'r v. Sidlinger et al.*, 21 Maine R. 185; hence, a bond is the subject of such a gift; *Wells v. Tucker*, 3 Bin. R. 370; *Braitley v. Hunt, adm'r*, 5 G. & Johns. R. 58; *Harris v. Clark et als. exec's*, 2 Barb. S. R. 94; *Miller v. Jeffress et al.*, 4 Gratt. R. 479; and so, of the note of a third person; *Bonneman v. Sidlinger et al.*, 15 Maine R. 429; *Holly v. Adams, adm'r*, 16 Vt. R.

the devisee, and the intervention of an executor is quite unnecessary

206; *Parker v. Marston*, 27 Maine R. 196; *Harris & Clark et als. exec's*, 2 Barb. S. R. 94; *Smith et al. v. Kittridge*, adm'r, 21 Vt. R. 238; *Sessions v. Moseley*, 4 Cush. R. 78; for, as was said in the case of *Coutant v. Schuyler et als.*, 1 Paige's R. 316, "Notwithstanding the attempts which have been made in England to distinguish between a promissory note and a bond, in relation to the validity of a gift of a chose in action, there cannot, in reason, be any difference. A gift of either is valid as a symbolical delivery of the debt due on the note or bond, and all the delivery of which the subject is capable;" and the fact that the note is payable to order and undorsed will not alter the case; *Harris v. Clark et als. exec's*, 2 Barb. S. R. 94; *Brown, exec. v. Brown et al.*, 18 Conn. R. 410, in which last case, Judge Hinman, says, "By the modern English cases, bonds, mortgages, and bank notes, are held to be proper subjects of this species of donation. It has not, to our knowledge, as yet been held, that the notes of third persons may be disposed of, in this way. * * * Lord Hardwicke held, that a bond might be disposed of in this way; and though he subsequently expressed his determination to stop there, and attempted to distinguish his decision from the case of receipts for South Sea annuities, and other choses in action; yet his reasoning has never been satisfactory. He said, that though a bond was a chose in action, yet it was itself the only evidence of the debt; that it could not be sued without a *profert* of it in court; the delivery of it, therefore, put it in the power of the donee, by destroying it, to prevent the donor from ever using it; and therefore, some property passed to the donee, by its delivery. * * * It clearly does not show any real distinction between bonds and other choses in action, in the particulars mentioned;" but that a valid gift in prospect of death cannot be made of a certificate of stock, see, *Pennington, adm'r v. Gitting's exec.*, 2 G. & Johns. R. 208. It was at one time held that the decedent's own note could be made to operate as a gift by reason of death; *Wright v. Wright et al.*, 1 Cow. R. 598; *Bowers v. Hurd*, adm'r., 10 Mass. R. 427; *McConnell v. McConnell*, 11 Vt. R. 290; *Jones, adm'r v. Deyer*, 16 Ala. R. 221; but these cases were overruled, and the opinion at present prevailing is against the validity of such a gift; *Parish v. Stone*, 14 Conn. R. 198; *Raymond v. Sellick et als. admr's*, 10 Id. 480; *Craig v. Craig*, 2 Barb. C. R. 78; *Smith et al. v. Kittridge*, adm'r, 21 Vt. R. 238; "a mere promise," said Judge Hibard in the case of *Holly v. Adams*, adm'r, 16 Vt. R. 206, to pay a sum of money is not a *donatio causa mortis*, within the meaning of the law * * * this was not a gift; it was merely a *promise to give*, and required the same interpositions of law to make it available, that are required in any case. * * * I am unable to see any distinction in principle, or indeed any reason why a note of a third person may not as well pass by a gift *causa mortis*, as a horse, or a piece of furniture, or any other species of personal property. * * * The doctrine of the case from 10th Mass., before alluded to, upon which the plaintiff has relied, is, that where the maker of a note has acknowledged that it was given for value, he is not at liberty to deny it. * * * But although that doctrine once obtained in Massachusetts, it is not law *there* now, and I am not aware that it was ever adopted in this state. We think, therefore clearly, that this note was but the evidence, which the daughter held, that the deceased, in his lifetime, had promised to give her the sum of money therein expressed, and to be treated like any other note which is void for want of a consideration." So, in the case of the donor's own draft or order upon some third person, Judge Gridley, in *Harris v. Clark et als. execs.*, 2 Barb. S. R. 94, delivered an opinion somewhat analogous to the one just preceding, as follows: "The question is, whether the executory promise

and inapplicable (1). The executor of a will of personal estate becomes entitled, from the moment of the death of the testator, to all his

of the donor, made without consideration, can be made the subject of a gift *causa mortis*. Such a gift *inter vivos* has been held void for the want of a legal consideration to support the promise in several adjudged cases in this court. * * * The gift was merely of a *void promise*, which though subsisting in the form of a written security, was as valueless as waste paper, and therefore incapable of being made the subject of a delivery or donation. * * * So far as it represents a valid claim against a third person, we can see no force in the direction that it was not delivered. But inasmuch as it is sought to be enforced against the executors of the donor, as representing and creating a legal obligation upon him, and available against them, as the representatives of the estate, it appears to us to be open to the objections; 1st, That being without consideration, it was a void promise, incapable of being made the subject of a delivery, or a gift; and 2d, That the draft being intended as a voluntary gift, rebuts the implication, which might otherwise arise of a guaranty on the part of the drawer, that the draft should be accepted and paid." And see also, 3 Comst. R. 93, and Craig v. Craig, 3 Barb. C. R. 78. The title to real estate will not pass by a *donatio causa mortis*, Meach v. Meach et al., 24 Vt. R. 591, and in the case of Headley v. Kirby, 6 Harris's R. 226, it was decided, that a decedent cannot thus dispose of all his property, Judge Lowry using the following language: "It is not pretended that any gift like this has ever been held good, and it may be safely declared that no mere gift made in prospect of death, and professing to pass all one's property to another, to take effect after death, can be valid under our statute of wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the statute of wills, so far as it is intended to exclude all modes of disposing of personal property at death,

which it does not provide for, is repealed by the decisions of the courts," but subsequently, in the case of Meach v. Meach et al., 24 Vt. R. 591, in which the Pennsylvania case appears to have been fully examined, it was held, that a gift of all one's personal property in view of death was valid, and in a note to that case, the question as to the amount or value of property which may pass by a *donatio mortis causa* is thus considered. "I find no case, except the late case in Pennsylvania, where any attempt has been made to limit its operation, on account of the comparative or absolute extent of the property disposed of. And the more I have reflected on the subject and compared the cases, with a view to evolve some rational and practicable principle of limitation to the extent of its operation, the more I have felt constrained to declare that it cannot be done by any powers of abstraction or generalization, which my short sight is able to command."

A delivery of a deed of gift, without a delivery of the thing given, is not sufficient to pass the title by way of a *donatio causa mortis*, Smith, adm'r v. Doaney, adm'r, 3 Ired. E. R. 268, and any such deed of gift must be proved as a will; Grattan, adm'r v. Appleton et als., 3 Story's R. 755; Miller v. Jeffress et als., 4 Gratt. R. 479. But see Execs. of Blake v. Low, 3 Desaus. R. 266; Brinkerhoff v. Lawrence, adm'r, &c., 2 Sandf. C. R. 400; Meach v. Meach et al., 24 Vt. R. 291.

A *donatio causa mortis* may be upon a condition other than those which are implied from the very nature of such a gift, Currie v. Steele et als., 2 Sandf. S. R. 542.

(1) The testamentary disposition of property without the appointment of an executor, is in technical language denominated a codicil, for "a codicil is a just sentence of our will, touching that which any would have done after their death, without the appointing of an executor. Which definition doth agree almost word

personal property (2), which after payment of the debts of the deceased he is bound to apply according to the directions of the will. Thus if the testator should specifically bequeath any part of his personal property, the property so bequeathed will not belong absolutely to the legatee until the executor has assented to the bequest (1); and this

(1) Co. Litt. 388 a; Com. Dig. tit. Biens (C); Williams on Executors, pt. 2, bk. 2.

for word with the definition of a testament: saving that some words are here expressed, which are there omitted *absque executoris constitutione*, without the appointment of an executor. By force of which words the codicil is made to differ from a testament: for a testament can no more consist or be without an executor, than a codicil can admit an executor. * * * Whereupon the writers conferring a testament and a codicil together, and perceiving the odds betwixt the one and the other, they call a testament a great will, and a codicil a little will. And do compare the testament to a ship, and the codicil to a boat, tied most commonly to the ship. And not unjustly, as well because the codicil is not able to sustain the heavy burthen of an executor, who representing the person of the testator, doth, as it were (like Atlas, who is feigned to carry the world on his shoulders) bear upon his back the whole mass and weight of all the goods and chattels which did belong to the deceased, and on whose neck are laid all the actions, which either might be intended against the testator by others, or against others by the testator;" &c. Swineburne on Wills, Vol. 1., Part 1., sec. v. pp. 28, 29.

(1) A legatee's title is not perfect, until the executor has assented to his legacy. Moore v. Barry, 1 Bail. R. 504; Lenoir v. Sylvester, Id. 504; Upchurch v. Norsworthy, 12 Ala. R. 532; Kelly's adm'r v. Kelly's distributees, 9 Id. 908; Rea v. Rhodes, 5 Ired. E. R. 148; Johnson v. The Conn. Bank, 21 Conn. R. 156; and this is true of every kind of bequest; as well of specific, Moore v. Barry, 1 Bail. R. 504; Lenoir v. Sylvester, Id. 504; Smith v. Towne's adm'r, 4 Munf. R. 191; Lillard v. Reynolds, 3 Ired. R. 370; Everitt v.

Lane, 2 Ired. E. R. 550; Frouty v. Frouty, 1 Bail. C. R. 517; Lark et al. v. Linstead et al., 2 Md. C. Decs. 162; Crist v. Crist, adm'r, 1 Cart. R. 570, as of general, Wilson v. Rine, 1 Har. & Johns. R. 138; Lark et al. v. Linstead et al., 2 Md. C. Decs. 162; Crist v. Crist, adm'r, 1 Cart. R. 570. And the assent of the legatee is equally necessary, Johnson v. The Connecticut Bank, 21 Conn. R. 156.

But "a very slight assent" on the part of the executor "is held sufficient, and it may be either express or implied, absolute or conditional. He may not only in direct terms authorize the legatee to take possession, but his assent may be inferred, either from direct expressions, or particular acts, and such constructive permission will be equally available. His assent may be implied; as, if the executor congratulate the legatee," &c., &c. Lynch v. Thomas, 3 Leigh's R. 686; Lillard v. Reynolds, 3 Ired. R. 370; Hearne v. Kevan et al., 2 Ired. E. R. 34; Chester et al. v. Greer et al., 5 Hump. R. 26; Hudson, exec., &c. v. Reeve, 1 Barb. S. R. 89; Rea v. Rhodes, 5 Ired. E. R. 148; and he may by implication assent to a legacy to himself, Hearne v. Kevan et al., 2 Ired. E. R. 34; Hudson, exec., &c. v. Reeve, 1 Barb. S. R. 89. In accordance with these principles, it has been held, that the mere acquiescence of the executor, without any formal consent, is sufficient, where the subject matter of the legacy is in the hands of the legatee at the death of the testator; Andrews ex'x. v. Hunneman et al., 6 Pick. R. 126; Lowry v. Mountjoy, 6 Call's R. 55; Finch et al. v. Rogers, 11 Hump. R. 583, in which it was said, that "In such case, the legatee being actually in possession, and that, too, by the act of the

assent must not be given until the executor is satisfied that there is sufficient to pay the debts of the deceased without having recourse to the property so specifically given (*k*).

If the testator should appoint as his sole executor an infant under

(*k*) Toller's Executors, book 3, s. 2; Williams on Executors, pt. 3, bk. 3, ch. 4, s. 3.

testator in his lifetime, the reason of the rule which requires the executor's assent, does not seem to apply. The executor, in the case stated, would not be chargeable with such chattel; it would not be assets in his hands; nor could he maintain any action against the legatee for its recovery, except in the event of a deficiency of assets to discharge the debts of the estate, after having fully administered the residue of his personal estate." So, too, the assent of the executor to a specific legacy will be presumed, after possession by the legatee for a considerable time; *Alexander v. Williams*, 2 Hill's (S. C.) R. 522; *White v. White*, 4 Dev. R. 257; *Merritt v. Windley*, 3 Id. 399; *White v. White*, 4 Dev. & Bat. R. 401; *Birney v. Richardson*, 5 Dana's R. 424; *Squires v. Old*, 7 Hump. R. 454; *Rea v. Rhodes*, 5 Ired. E. R. 148; *Jordan v. Thornton et al.*, 7 Geo. R. 517; *Lott v. Meacham*, 4 Fla. R. 144; *Finch et al. v. Rogers*, 11 Hump. R. 563; and an assent to a legacy for life is effectual as to the subsequent interest bequeathed by the will; *Conner v. Satchwell*, adm'r., 4 Dev. & Bat. L. R. 76; *Ingram v. Terry et als.* 2 Hawk's R. 122; *Hearne v. Kevan et al.*, 2 Ired. E. R. 34; *Acheson et als. v. McCombs et als.*, 3 Id. 554; *Rea v. Rhodes*, 5 Ired. E. R. 148; *Jordan v. Thornton et al.*, 7 Geo. R. 517; *Lott v. Meacham*, 4 Fla. R. 144; *Finch et al. v. Rogers*, 11 Hump. R. 563.

The executor may give his consent within the time allowed by law for the payment of debts, *Thompson v. Schmidt*, 3 Hill's (S. C.) R. 156, and after that assent, a creditor of the testator, can no longer pursue the property in the hands of the legatee through a judgment and execution against the executor; but he may still fol-

low the specific legacies, by making all the legatees parties to a bill in equity; *Burnley v. Lambert*, 1 Wash. R. 399; *Alexander v. Williams*, 2 Hill's (S. C.) R. 522; *Lyon v. Vick et al.*, 6 Yerg. R. 42; *Nunn v. Owens*, 2 Strobb. R. 101; *Buchanan v. Pue, Jr., exec.*, 6 Gill's R. 112.

Where an executor is refractory, and refuses to confirm the title of a legatee, a court of equity will compel him; *Lark et al. v. Linstead et al.*, 2 Md. C. Decs. 162; *Huckabee, adm'r v. Swoope*, 20 Ala. R. 491; *Crist v. Crist, adm'r.*, 1 Cart. R. 570.

The opinion of Judge Nelson in the case of *McClanahan, adm'r, v. Davis et al.*, 8 How. R. 178, may be here quoted, as containing a summary of the law on this subject. "The legatee, whether general or specific, or whether of chattels real or personal, must first obtain the executor's assent to the legacy before his title can become perfect. He has no authority to take possession of the legacy without such assent, although the testator by the will expressly direct that he shall do so. * * * But the law has prescribed no particular form by which the assent of the executor shall be given, and it may be, therefore, either express or implied. It may be inferred from indirect expressions or particular acts; and such constructive permission shall be equally available. An assent to the interest of tenant for life of a chattel will inure to vest the interest of the remainder, and *e converso*, as both constitute but one estate. So an assent to a bequest of a lease for years carries with it an assent to a condition or contingency annexed to it; and it may be implied from the possession of the subject bequeathed by the legatee for any considerable length of time."

the age of twenty-one years, such infant will not be allowed to exercise his office during his minority; but during this time the administration of the goods of the deceased will be granted to the guardian of the infant, or to such other person as the spiritual court may think fit (*l*). Such person is called an administrator *durante minore ætate* (*m*) (1). If a married women should be appointed an executrix, she cannot accept the office without the consent of her husband (*n*), and having accepted it with his consent, she is unable, without his concurrence to perform any act of administration which *may be to his preju- [*256] dice; whilst he, on the other hand, may release debts due to the deceased, or make assignment of the deceased's personal estate without his wife's concurrence (*o*): for as the general rule of law is that a husband and wife are but one person, the power, and with it the responsibility, are vested in the husband. Nevertheless a married woman, being an executrix, may make a will without the consent of her husband, confined to the personal estate of which she is executrix (*p*);

(*l*) Stat. 38 Geo. III. c. 87, s. 6.

(*m*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 3.

(*n*) Ibid. pt. 1, bk. 3, ch. 1.

(*o*) Williams on Executors, pt. 3, bk. 1, ch. 4; 5 Rep. 27 b.

(*p*) Ibid. pt. 1, bk. 2, c. 1, s. 2.

(1) By the 23d sec. of an act of the legislature of Pennsylvania, of the 15th of March, 1832, it is enacted, that "Whenever all the executors named in any last will and testament, or all the persons entitled as kindred to the administration of any decedent's estate, shall happen to be under the age of twenty-one years, it shall be lawful for the register to grant administration * * * to any other fit person or persons, subject nevertheless to be terminated at the instance of any of the said minors who shall have arrived at the full age of twenty-one years." Purd. Dig. (1853), p. 191, sec. 27.

A similar provision is in force in Massachusetts. "When a person appointed executor is under the age of twenty-one years, at the time of proving the will, administration may be granted with the will annexed, during his minority, unless there be another executor who shall accept the trust, in which case, the estate shall be administered by such other executor, until

the minor shall arrive at full age, when he may be admitted as joint executor with the former, upon giving bond as before provided." Revis. Stats. of Mass. (1836), p. 423, § 6.

In the state of New York it is provided, that "If any person who would otherwise be entitled to letters of administration as next of kin, or to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons." Revis. Stats. of N. Y. (3d ed.), Vol. 2, p. 139, § 34.

And see also, N. H. Compil. Stats. (1853), p. 404, sec. 6; Thomps. Dig. of the Ls. of Fla., p. 195, sec. 2; Revis. Stats. of Vt. (1839), pp. 260, 261, sec. 6; Revis. Stats. of Maine, pp. 437, 438, sec. 12; Ls. of Dela. Revis. Code of 1852, p. 297, sec. 7; Stats. of O. (1841), p. 340, sec. 8.

and the executor of her will so made, will be the executor of the original testator. For it is a general rule that if any executor should die before having completely administered the estate of his testator, the executor appointed by the will of such executor will be entitled to complete the distribution of the estate of the former testator (*q*) (1).

The testator however may, and usually does, appoint more than one (*q*) 2 Bla. Com. 506.

(1) The statute law in the United States, generally is, that an executor of an executor, cannot be the executor of the first testator. Thus, in New York, "No executor of an executor, shall, as such, be authorized to administer on the estate of the first testator; but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the assets of the first testator left unadministered, shall be issued," &c. Revis. Stats. of N. Y. (3d ed.), Vol. 2, p. 136, § 18. In Massachusetts, "The executor of an executor shall have no authority, as such, to administer the estate of the first testator; but on the death of the sole or surviving executor of any last will, administration of the estate of the first testator, not already administered, may be granted, with the will annexed, to such person, as the judge of probate shall think fit to appoint." Revis. Stats. of Mass. (1836), p. 423, § 10. In Pennsylvania, "Whenever a sole executor, or the survivor of several executors, shall die, leaving goods or estate of his testator unadministered, the register having jurisdiction, shall, notwithstanding such executor may have made his last will and testament, and appointed an executor or executors thereof, grant letters of administration, of all such goods and estate, in the same manner as if such executor had died without having made any testament or last will; and the executor of such deceased executor shall in no case be deemed executor of the first testator." *Purd. Dig.* (1853), p. 189, sec. 15. And see, N. H. *Compil. Stats.* (1853), p. 405, sec. 8; *Code of Va.* (1849), pp. 541, 542, sec. 8; *Revis. Stats. of Vt.* (1839), p. 261, sec. 12; *Michigan Revis. Stats.*, p. 278, sec. 11; *Revis. Stats. of Maine*, p. 441, sec. 36; *Ls. of Dela. Revis. Code* of 1852, p. 297, sec. 10; *Stats. of O.*, (1841), p. 340, sec. 10.

But in New Jersey it is provided, that "All and every the executors and administrators of any person or persons, who, as executor or executors, either of right, or in his, her, or their own wrong, or as administrator or administrators, hath or have wasted or converted, or hereafter shall waste or convert any goods, chattels, estate, or assets of any person deceased, to his, her, or their own use, shall be liable and chargeable, in the same manner as his, her, or their testator or intestate would have been, if living," and that "executors of executors shall have actions of debt, account, and of goods carried, away of the first testator, and execution of judgments obtained by, or recognizances made to the first testator, in any court of record, in the same manner as the first testator should have had if he were in life, as well of actions of the time past as of the time to come; and the same executors of executors, shall answer to others, of as much as they have recovered of the goods of the first testator, as the first executors should do if they were in life." *Elmer's Dig. of the Ls. of N. J.*, p. 165, sec. 6. And similar provisions are in force in North and South Carolina, *Revis. Stats. of N. C.* (1836-7), Vol. I., pp. 280, 281; *Stats. of S. C.*, Vol. II., p. 439.

person his executors. In this case the law regards all the co-executors as one individual person; and consequently any one of the executors of full age may, during the life of his companions, perform, without their concurrence, all the ordinary acts of administration, such as giving receipts, making payments and selling and assigning the property (*r*). But all the executors, infants included, must join in bringing actions respecting the estate (*s*). If, therefore, the testator appoint a person indebted to him as his executor, or one of his executors, this appointment will operate at law as a release of the debt (*t*)(1). For the debt is a chose in action, *and a man [*257] cannot either solely or conjointly with others bring an action

(*r*) Shep. Touch. 484.

(*s*) Williams on Executors, pt. 3, bk. 1, c. 2. An ejectment was an exception, as any one executor might demise the entirety of the testator's leasehold land. Doe d. Stace v. Wheeler, 15 Mee. & Wels. 623.* But see now stat. 15 & 16 Vict. c. 76, ss. 168 *et seq*.

(*t*) Wentworth's Executors, 73, 14th ed.; Freakley v. Fox, 9 B. & Cress. 130.*

(1) The statutes of many of the states of the Union establish a rule contrary to that stated in the text. Thus, by the laws of Florida, "If any person shall appoint his or her debtor to be the executor of his or her last will and testament, such appointment shall not either in law or equity be construed to operate as a release or extinguishment of any debt due to the testator, unless the same be so expressly declared in said last will and testament." Thomps. Dig. of the Ls. of Fla., p. 196, sec. 1, ch. 7. And so also in Texas, "If a debtor be appointed, by will, executor, such appointment shall not, in law or equity, be construed as an extinguishment, or release of the debt—unless the same be clearly expressed in the will as the intention of the testator." Dallam's Dig. of the Ls. of Tex., pp. 92, 93. See also, New Dig. of the Ls. of Geo., by T. R. R. Cobb, (1851), Vol. I., pp. 302, 303, sec. 51; Code of Va. (1849), p. 543, sec. 13; Clay's Ala. Dig., p. 228, sec. 35; Elmer's Dig. of the Ls. of N. J., p. 599, sec. 26; Revis. Stats. of N. C. (1836–7), Vol. I., p. 278, sec. 21; Morehead & Brown's Dig. of Ky. Stats., p. 668, sec. 49; Stats. of S. C., Vol. V., p. 111, sec. 25; Ls. of Dela. Revis. Code of 1852, p. 301, sec. 18; Dig. of Stats. of Ark., p. 125, sec. 82; Stats. of O. (1841), p. 349, sec. 66; How. & Hutch. Stat. Ls. of Missi., p. 404, sec. 67.

By the 2d sec. of an act of the legislature of Pennsylvania of the 3d of April, 1829, it is provided, that "In all cases where a creditor hath appointed or shall appoint his judgment debtor his executor, and the said judgment is a lien on the real estate of such executor, and the same is bequeathed specifically to a legatee, or generally in the residuary clause of such testator's will, or where any testator, having a judgment situated as aforesaid, shall have creditors interested in preserving the lien of such judgment, such legatee or creditor so interested in such judgment, may suggest their interest in the same upon the record thereof, and issue a writ of *scire facias* against the defendant to revive the same, and continue the lien thereof at any time when such proceedings shall be necessary under the laws of this commonwealth, which judgment so revived, shall remain for the use of all persons interested therein." Purd. Dig. (1853), p. 197, sec. 71.

against himself. In equity, however, an executor who was indebted to the testator is bound to account for his debt to the estate of the testator (*u*). On the decease of any co-executor, the office survives to those who remain; and this survivorship operates to such an extent, that if one of them should renounce the executorship in the lifetime of his companions, he may at any time change his mind and undertake the office. But if, having survived all his companions, he should then renounce (*v*), or if, without such renunciation, administration should then be granted to another person (*w*), he cannot afterwards interfere. When there are two or more executors, the executor of the will of the survivor of them, will, after the decease of all of them, be entitled to act as executor of their testator (*x*) (1).

If any person not duly authorized should intermeddle with the goods of the testator, or do any other act relating to the office of executor, he thereby becomes an executor of his own wrong, or, as it is called in law French, an executor *de son tort*. Such an executor is liable to the same demands from the creditors of the deceased as if he had been regularly appointed; but like a regular executor he is not liable beyond the amount of the assets of the testator which have come to his hands. The chief difference between such an executor and one who has been duly appointed is this: that an executor *de son tort* is not allowed to derive any benefit from his own wrongful intermeddling; whereas a regularly appointed executor, if a creditor of the deceased, [*258] may lawfully* retain his own debt out of the assets in preference to all other debts of the same degree (*y*).

The most striking difference between a will of personal estate and a will of lands, yet remains to be noticed. A will of lands has always operated and still operates as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title. But a will of personal estate requires to be proved in some ecclesiastical court. In this court the will itself is deposited, and a copy of the will,

(*u*) Bac. Ab. tit. Executors and Administrators (A) 10; *Simmons v. Gutteridge*, 13 Ves. 264.

(*v*) *Hensloe's case*, 9 Rep. 36; *Creswick v. Woodhead*, 4 Man. & Gran. 811.*

(*w*) *Venables v. East India Company*, 2 Ex. Rep. 633.*

(*x*) *Williams on Executors*, pt. 1, bk. 3, ch. 4.

(*y*) *Williams on Executors*, pt. 1, bk. 3, ch. 5; pt. 3, bk. 2, ch. 2, s. 6.

(1) See ante, p. 256, note.

which is given by the court to the executor on proving, denominated the probate copy, is the only proper evidence of the right of the executor to intermeddle with the personal estate of his testator (z) (1).

(z) *Rex v. Netherseal*, 4 T. R. 260; Wms. Ex. pt. 1, bk. 4, ch. 1.

(1) For the regulations adopted by the several states of the Union on the subject of the Probate of Wills, see *Revis. Stats. of N. Y.* (3d ed.), Vol. 2, p. 126, &c.; *Revis. Stats. of Mass.* (1836), p. 421; *Purd. Dig.* (1853), p. 187, &c.; *N. H. Compil. Stats.* (1853), p. 402, sec. 1; *Dallam's Dig. of the Ls. of Tex.*, pp. 12 to 17; *Thomps. Dig. of the Ls. of Fla.*, p. 193, sec. 3; *New Dig. of the Ls. of Geo.* (1851), pp. 281 to 287; *Code of Va.* (1849), pp. 519 to 522; *Revis. Stats. of Vt.* (1839), pp. 248 to 253; *Michigan Revis. Stats.*, p. 275, sec. 30; *Clay's Ala. Dig.*, p. 301, sec. 21, &c., p. 303, sec. 31, and p. 598, secs. 10 and 12; *Dorsey's Ls. of Md.*, Vol. 2, pp. 1058, 1059, sec. 1; *Revis. Stat. of Maine*, p. 429, et seq.; *Elmer's Dig. of the Ls. of N. J.*, p. 595, secs. 2 and 3; *Revis. Stats. of N. C.* (1836-7), Vol. 1, p. 619, sec. 1, p. 621, secs. 6 and 9; *Loughborough's Dig.* p. 585; *Stats. of S. C.*, Vol. 6, p. 209; *Caruthers & Nicholson's Stat. Ls. of Tenn.*, p. 713, &c.; *Ls. of Dela.*, *Revis. Code of 1852*, p. 296, &c.; *Dig. of the Stats. of Ark.*, p. 991, &c.; *Stats. of O.* (1841), p. 996, sec. 33.

As to the operation and effect of the probate of a will, a distinction is to be made between personal and real property. The probate of a will of personalty is conclusive evidence while it remains unrevoked throughout the Union, as will be seen by the following cases. But as regards realty, the decisions are not uniform; some holding, that the probate is of equal effect with that of personal property, while others support the English or common law doctrine; the former is acknowledged as the law of Rhode Island, Alabama, Maine, Massachusetts, New Hampshire, Connecticut, Ohio, and Kentucky, *Potter v. Webb et als.*, 2 Greenl. R. 257; *Small et al. v. Small*, 4 Id. 224; *Osgood v. Breed*, 12

Mass. R. 533; *Inhabitants of Dublin v. Chadbourne*, 16 Id. 433; *Laughton v. Atkins*, 1 Pick. R. 549; *Tompkins v. Tompkins*, 1 Story's R. 547; *Poplin v. Hawke*, 8 N. H. R. 124; *Judson v. Lake*, 3 Day's R. 318; *Bush v. Sheldon*, 1 Id. 170; *Bailey v. Bailey et al.*, 8 O. R. 246; *Tarver v. Tarver et als.*, 1 Pet. R. 180; *Patten v. Tallman*, 27 Maine R. 17; *Singleton v. Singleton et al.*, 8 B. Mon. R. 348; and the latter principle is received in New York, Maryland, and South Carolina, *Jackson v. Thompson*, 6 Cow. R. 178; *Rogers v. Rogers*, 3 Wend. R. 514; *Smith's Lessee v. Steele*, 1 Har. & McHen. R. 419; *Darby v. Mayer et al.*, 10 Wheat. R. 465; *Exec's of Crossland v. Murdock*, 4 McCord's R. 217. In Pennsylvania, North Carolina, and Tennessee, the probate of a will of realty, is received as *prima facie* evidence in regard to real estate; *Coates v. Hughes*, 3 Bin. R. 498; *Smith v. Bon-sall*, 5 Raw. R. 83; *Walmsley v. Read et al.*, 1 Yeat. R. 87; *Spangler v. Rambler*, 4 Serg. & Raw. R. 192; *Logan v. Watt et als.*, 5 Id. 212; *Stanley v. Kean*, 1 Tayl. R. 93; *Rowland v. Evans*, 6 Barr's R. 435; *Thompson v. Thompson*, 9 Id. 234; *Dormick et als. v. Reichenback*, 10 Serg. & Raw. R. 89; *Weatherhead v. Sewell et als.*, 9 Hump. R. 282; and, in Louisiana, it has been held that it is at least *prima facie* evidence, if not conclusive, *Donaldson v. Winter*, 1 La. R. 144.

In the state of Virginia, Judge GREEN, in the case of *Bagwell et als. v. Elliott*, 2 Rand. R. 200, decided, that it was not "necessary that a will should be proved in a Court of Probate, in order to give it validity as a will of lands. The only effect of such probate is, to afford one mode of proof that the will is genuine and authentic; but the mode of proof allowable before the passing of those statutes, is not

Before probate, however, the executor may perform all the ordinary acts of administration, such as receiving and giving receipts for debts due to the testator, paying the debts owing by the testator, and selling and assigning any part of the personal estate. But when evidence is required of his right to intermeddle, the probate is the only valid proof; without it, therefore, no action or suit can be maintained, although proceedings may be commenced before, and carried up to the point where the evidence is required (a) (1).

The jurisdiction of the ecclesiastical courts over wills of personal estate is of very ancient origin. The probate of wills of personalty, as a means of their authentication, appears to have been in use from the very earliest times. The first persons by whom probate was granted were said to be the lords of manors; and some vestiges of [*259] this ancient right seem yet to remain in the *case of one or two manors, the lords of which still retain such a jurisdiction (b).

(a) Williams on Executors, pt. 1, bk. 4, ch. 1, s. 2; Stuart v. Burrowes, 1 Drury, 265, 274.

(b) Wentworth's Ex. 14th ed. 99, 100; Toller's Executors, 50.

abolished or prohibited by them; that is, by evidence on the trial. If a will offered for probate were contested and rejected, this might be used thereafter, as the decision of a competent judicial tribunal, and would condemn it forever." And see, Parker's exec's v. Brown's exec's et als., 6 Gratt. R. 554.

(1) In some of the states this power has been controlled by statute, and in others it has been confirmed; thus, in Ohio, "No executor named in a will, shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay funeral charges, nor to interfere in any manner, with such estate, further than is necessary for its preservation." Stats. of O. (1841), p. 341, sec. 11. And so also, in Virginia, and New York; Code of Va. (1849), pp. 540, 541, sec. 1; Revis. Stats. of N. Y. (8d ed.), Vol. 2, p. 136, sec. 17. But in Kentucky it has been provided in the act relating to the probate of wills, that "The power of executors over their testator's

estate before probate of the will is not hereby restrained, but shall continue as heretofore." Dig. of Ky. Stats., by Morehead & Brown, Vol. 1, p. 660, sec. 22.

In Alabama, it has been decided, that executors are not entitled to exercise any powers, as such, other than collecting, and taking care of the estate, until they have given bond, and taken the oath prescribed; Cleveland et al. execr's v. Chandler, 3 Stew. R. 489; nor, will their assent to a legacy, before probate, give any title to the legatee; Gardner et al. v. Gault et al., 19 Ala. R. 666. In Vermont, an executor has no authority under a will, until the same is approved or allowed by the judge of probate; Tucker, exec. v. Starks et al., Brayton's R. 99. And see Trask v. Donoghue, 1 Aik. R. 370; Thomas et al. exec's v. Cameron, 16 Wend. R. 579. But in New Hampshire, it has been held, that an executor derives his authority from the testator, and may commence an action, as such, before probate of the will; Strong, exe'x v. Perkins, 3 N. H. R. 517.

But so early as the time of Glanville, who wrote in the reign of Henry II., the ecclesiastical courts had acquired an exclusive right to determine on the validity of a will or the bequest of a legacy (*c*). And, from this period, the right of the church to interfere in testamentary matters became gradually settled, though not without much opposition on the part of the temporal lords.

A will must be proved in the court of the bishop or ordinary in whose diocese the testator dwelt, and within whose jurisdiction the personal effects of the testator consequently lie. But if there be effects to the value of 5*l.*, called *bona notabilia*, in two distinct dioceses or jurisdictions within the same province, either of Canterbury or York, the will ought to be proved in the Prerogative Court of the archbishop of that province (*d*). If there be personal effects within two provinces, the will must be proved in each province, either in the Prerogative Court, or in some court of inferior jurisdiction; observing, as to each province, the same rule as would have applied had the testator had no property elsewhere (*e*). If probate be granted by a bishop, or other inferior judge, in a case where the deceased had goods to the value of 5*l.* in any other diocese in the same province, such probate will be absolutely void; but probate granted by an archbishop, in a case where the deceased had not *bona notabilia* in divers dioceses, will be voidable only, and not absolutely void (*f*).

*The evidence required by the ecclesiastical court for the proof of a will varies according to the form of the attestation, and also according to the circumstance of the validity of the will being or not being disputed. The usual and proper form of attestation to a will expresses that the formalities required by the Wills Act (*g*) have been complied with; thus, "Signed and declared by the above named A. B., the testator, as and for his last will and testament, in the

(*c*) Glanville, lib. 7, c. 6, 7; 1 Reeves' Hist. Eng. Law, 72.

(*d*) Williams on Executors, part 1, book 4, chap. 2. For an account of the rise of the archbishop's jurisdiction, see Gent. Mag. new series, vol. 12, p. 582.

(*e*) Second Report of Real Property Commissioners, 67.

(*f*) Wentworth's Executors, 110, 14th ed.; Lysons v. Barrow, 2 Bing. N. C. 486.* By stat. 10 & 11 Vict. c. 98, ss. 3, 4, continued by stat. 14 & 15 Vict. c. 29, the jurisdiction of the ecclesiastical courts in England in testamentary matters, and the law of *bona notabilia*, continue unaltered by the recent changes of provinces, dioceses, archdeaconries, and other jurisdictions affected under the provisions of stat. 6 & 7 Will. IV. c. 77.

(*g*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, ante, p. 252.

presence of us, both present at the same time, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses." When the attestation is in this form, and the validity of the will is not disputed, it is *proved* by the simple oath of the executor, that he believes the will to be the true last will and testament of the deceased. But as such a form of the attestation clause is not essential to the validity of the will (*h*), wills are sometimes informally made without any clause of attestation, or with a clause which does not express that the required formalities have been complied with. When this occurs, an affidavit, in addition to the executor's oath, is required from one of the subscribing witnesses, that the will was executed in compliance with the statute (*i*). Probate in either of the above modes is termed probate *in common form*. But if the validity of the will should be disputed, or any dispute should be anticipated by the executor, the will is proved *in solemn form per testes*. In this case both the witnesses are sworn and examined, and [*261] such other evidence* taken as the circumstances require, in the presence of the widow and next of kin of the testator, and all others pretending to have any interest, who are cited to be present to see the proceedings. When a will has once been proved in this form it is finally established, and the executor cannot be compelled to prove it any more; but when a will has been proved merely in common form the executor may, at any time within thirty years, be compelled by any party interested to prove it *per testes* in solemn form (*k*).

Probates of wills are required by act of parliament to be stamped with an *ad valorem* duty, according as the value of the personal estate of the testator, within the jurisdiction of the spiritual judge granting probate (*l*), may exceed twenty pounds, the lowest amount of the scale, or amount to one million, the highest (*m*). But probates of wills operating merely in exercise of powers of appointment over property of which the deceased had no ownership, are not subject to duty in respect of the value of the property appointed (*n*). Exemptions from

(*h*) Sect. 9.

(*i*) Williams on Executors, part 1, book 4, chap. 3, sect. 3.

(*k*) Williams on Executors, part 1, book 4, chap. 3, sect. 4.

(*l*) Attorney General v. Hope, 1 Cro. Mee. & Rosc. 530; * 4 Tyr. 878; 8 Bligh. 44; 2 Cl. & Fin. 84; Attorney General v. Bouwens, 4 Mee. & Wels. 171; * Williams on Executors, pt. 1, bk. 7.

(*m*) Stat. 55 Geo. III. c. 184. See also stat. 5 & 6 Vict. c. 79, s. 23, as to the return of part of the duty when the property has been reduced by payment of debts.

(*n*) Platt v. Routh, 6 Mee. & Wels. 756; * 3 Beav. 257; affirmed in the House of Lords.

probate duty have also been made by parliament in favour of the effects of common seamen, marines and soldiers, who may be slain or die in the queen's service (*o*), and in favour of depositors in savings banks whose whole estate and effects shall not exceed fifty pounds sterling (*p*). And pay, wages, prize money or pensions due to deceased naval officers, marines, seamen,* and others employed [*262] in the navy, whose whole assets shall not exceed thirty-two pounds, are allowed to be paid out without probate of their wills (*q*). Probates of the wills of petty officers and seamen in the royal navy, and of marines and non-commissioned officers of marines, are placed by act of parliament under the care of an officer called the inspector of seamen's wills' and are subject to special regulations made to prevent frauds on persons proverbially careless, and liable to imposition (*r*).

When the will has been proved, it is the duty of the executor to pay the testator's debts out of the personal estate, to which such executor becomes entitled by virtue of his office. For this purpose the executor has reposed in him by the law the fullest powers of disposition over the personal estate of the deceased, whatever may be the manner in which it has been bequeathed by the will (*s*). And in the event of a sale of any such property by the executor, the purchaser is not bound to inquire whether there are any debts remaining unpaid; for in the absence of evidence to the contrary, the executor is presumed to be acting in the proper discharge of his office (*t*). Nor is the purchaser at all concerned with the application which the executor may make of the purchase money; but the executor's receipt will be a sufficient discharge, and he alone will be responsible to the creditors and legatees for its due application (*u*). The order in which debts ought to be paid out of the *personal estate of a deceased debtor has been already noticed in the chapter on debts (*x*); [*263] and it has also been stated that the executor, if a creditor, is entitled

(*o*) Stat. 55 Geo. III. c. 184.

(*p*) Stat. 9 Geo. IV. c. 92, ss. 40-42.

(*q*) Stat. 4 & 5 Will. IV. c. 25, s. 8.

(*r*) Stat. 11 Geo. IV. & 1 Will. IV. c. 20, ss. 55-58, amended by stat. 2 & 3 Will. IV. c. 40, ss. 12, 13; 4 & 5 Will. IV. c. 25, s. 8; Williams on Executors, pt. 1, bk. 4, c. 4; bk. 5, chap. 2, s. 4.

(*s*) Ewer v. Corbet, 2 P. Wms. 148.

(*t*) Nugent v. Gifford, 1 Atk. 463; Elliot v. Merriman, 2 Atk. 42.

(*u*) Whale v. Booth, 4 T. Rep. 625, n.; M'Leod v. Drummond, 17 Ves. 154.

(*x*) Ante, pp. 95, 97, 100, 103.

to retain his own debt in preference to all others of the same degree (*y*).

When the debts have been paid, the legacies left by the testator are then to be discharged. In order to give the executor sufficient time to inform himself of the state of the assets and to pay the debts of the deceased, he is allowed a twelvemonth from the date of the death of the testator before he is bound to pay any legacies (*z*). From this time, all such general legacies as remain unpaid carry interest, at the rate of four per cent. per annum (*a*). Notwithstanding the lapse of a year from the testator's death, the executor, however, is still liable to any creditor of the deceased to the amount of the assets which have come to the executor's hands (*b*); and if he should have paid any legacies in ignorance of the claims of the creditor, his only remedy is to apply to the legatees to refund their legacies, which they will be bound to do, in order to satisfy the debt (*c*). From this liability to creditors, an executor cannot be discharged, unless he throw the property into chancery, in which case the court undertakes the administration, and the executor is consequently exonerated from all risk (*d*). The executor, however, is of course not answerable to the testator's creditors beyond the amount of assets which have come to his hands (*e*), unless he [*264] should for *sufficient consideration give a written promise to pay personally (*f*), or should do any act amounting to an admission that he has assets of the testator sufficient for the payment of the debts (*g*) (1).

(*y*) Ante, p. 258.

(*z*) Ward v. Penoyre, 13 Ves. 333; Benson v. Maude, 6 Madd. 15.

(*a*) Ward v. Penoyre, ubi supra.

(*b*) Norman v. Baldry, 6 Sim. 621; Knatchbull v. Fearnhead, 3 My. & Cr. 122; Hill v. Gomme, 1 Beav. 540.

(*c*) March v. Russell, 3 My. & Cr. 31.

(*d*) 3 My. & Cr. 126.

(*e*) Bac. Abr. tit. Executors (P), 1.

(*f*) Stat. 29 Car. II. c. 3, s. 4; ante, p. 70; 1 Wms. Saund. 210, n. (1); 211, n. (2.)

(*g*) Horsley v. Chaloner, 2 Ves. sen. 83.

(1) An executor or administrator can only be made answerable for the assets which come to his hands; Douglass v. Satterlee et als., adm'rs., 11 Johns. R. 16; Williams v. Holden, 4 Wend. R. 229; Call et al., exec's, v. Ewing, 1 Blackf. R. 301; Moore's adm'rs v. Tandy et als., 3 Bibb's R. 97; Byrd v. Holloway, 6 Smed. & Mar. R. 199; Loundes, &c., v. Pinckney et al., 2 Strobb. E. R. 44; Robinson v. Lane, 14 Smed. & Mar. R. 161; but, where he has been in possession of assets, and has handed them over to his co-executor or administrator, or has in any way connived at the

On the payment or delivery of any legacy of the amount or value of 20*l.* or upwards, whether payable out of the estate of the testator, real or personal, or out of any real or personal estate over which he had a power of appointment (*h*), a receipt must be given by the legatee, which is chargeable with a duty, called the legacy duty, on the amount or value of the legacy (*i*). But no sum of money, which by any marriage settlement is subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the

(*h*) Stat. 8 & 9 Vict. c. 76, s. 4; *Attorney General v. Marquis of Hertford*, 3 Ex. Rep. 670.

(*i*) Stat. 36 Geo. III. c. 52, s. 27.

possession of the assets by his co-executor or administrator, he will be responsible for their administration; *Douglass v. Satterlee et als.*, adm'rs., 11 Johns. R. 16; *Stewart v. Conner*, 9 Ala. R. 803; *Edmonds et al. v. Crenshaw*, 14 Pet. R. 166; *Mesick, exec., v. Mesick et als.*, 7 Barb. S. R. 120; *Clarke v. Jenkins et als.*, 3 Rich. E. R. 319.

A promise, however, made by an executor or administrator, in writing, to pay the debt of his testator or intestate, will make him individually liable; *Ciples v. Alexander*, 2 Constitutional R. 768; *Robinson v. Lane*, 14 Smed. & Mar. R. 161; *Carter v. Thomas*, 3 Cart. R. 213; provided, it be made upon a sufficient consideration; *Byrd v. Holloway*, 6 Smed. & Mar. R. 199; *Mosely et als. v. Taylor*, 4 Dana's R. 542; *Robinson v. Lane*, 14 Smed. & Mar. R. 161; and, forbearance is a sufficient consideration, *Taliaferro v. Robb et als.* adm'rs, 2 Call's R. 217; *Mosely et als. v. Taylor*, 4 Dana's R. 542; but a verbal promise, even if upon a good consideration, will not be binding, in those States where the statute of frauds requires the promise of an executor to pay the debt of his testator to be in writing, as falling within the provisions of that statute; *Harrington v. Rich*, 6 Vt. R. 666.

But where an executor admits that he has assets, or does any act amounting to such an admission, he will make himself individually responsible for the debts of

the decedent; *Taliaferro v. Robb et als.* execs., 2 Call's R. 217; *Ten Eyck v. Vanderpoel*, 8 Johns. R. 120; *Sleighter v. Harrington, exe'x.*, 2 Tayl. R. 249; *Sims v. Stilwell*, 3 How. (Missi.) R. 181; *Loundes, &c. v. Pinckney et al.*, 2 Strobb. E. R. 44; *Ciples v. Alexander*, 2 Constitutional R. 768; in which last case, it was said by Judge Bay, "As there is no privity of contract between the executor or administrator, and a testator or intestate's creditor, it is not presumed in law, that they can know whether a demand is just or unjust. And therefore, a bare admission alone, on the part of an executor or administrator is not sufficient to charge the estate with the debt, although they may admit they have assets for that purpose, and that will charge them in case of a deficiency, provided that there is a legal recovery against them."

"A promissory note imports a consideration, and it is unnecessary to state any in pleading, or to prove any upon the trial, in the first instance. When such note is given by an executor or administrator, it is *prima facie* evidence of assets, because they are the legal consideration upon which the promise ought to be, and is presumed to be founded; it is, however, but *prima facie* evidence between the original parties, and the defendant may show that in fact there was a deficiency of assets, and of course no consideration to support the note." *Bank of Troy v. Topping et al.*, 13 Wend. R. 557; S. C., 9 Id. 273.

benefit of the issue of any such person or persons, is liable to legacy duty under the will in which such sum is appointed or apportioned in exercise of such limited power (*k*). The amount of legacy duty varies according to the degree of relationship which the legatee bore to the deceased (1). Where the legacy is to a child or lineal descendant, or to the father or mother or any lineal ancestor of the deceased, the duty is one per cent. If to a brother or sister, or any descendant of a brother or sister, the duty is three per cent. If to a brother or sister of the father or mother of the deceased, or any descendant of such brother or sister, five per cent. If to a brother or sister of a grandfather or grandmother of the deceased, or any descendant of such brother or sister, six per cent. And if the legacy be to [*265] *any person in any other degree of collateral consanguinity to the deceased, or to any stranger in blood, the duty is ten per cent (*l*). But 'the husband or wife of the deceased are exempt from all legacy duty, and so also are the royal family.

If a legacy be given to an infant, or to a person absent beyond the seas, the only way in which the executor can obtain a proper discharge for such legacy is by payment of it, after deducting the legacy duty, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person for whose benefit the same shall be so paid. The money is then laid out by the accountant-general in the purchase of consols, which, with the dividends thereon, are afterwards transferred and paid to the person entitled, or otherwise applied for his benefit, on application to the Court of Chancery by petition or motion in a summary way (*m*). The legacy duty on annuities for lives is fixed by tables given in the act, and is payable by four equal payments, to be made successively on completing each of the first four years' payments of the annuity (*n*).

(*k*) Stat. 8 & 9 Vict. c. 76, s. 4.

(*l*) Stat. 55 Geo. III. c. 184.

(*m*) Stat. 36 Geo. III. c. 52, s. 32; *Ex parte Bennett*, V. C. K. B. 15 Jur. 213.

(*n*) 36 Geo. III. c. 52, s. 8.

(1) The statutes of Virginia, and Pennsylvania, contain provisions by which collateral inheritances are subjected to a certain tax; this tax does not vary according to the degree of relationship, as in the English laws, but is fixed, in the former at two, and in the latter at five per cent. upon the estate, real, personal, or mixed of every decedent, coming to, or about to be enjoyed by any other person than the "father, mother, husband, wife, children and lineal descendants," of such decedent. *Purd. Dig.* (1853), p. 138, &c.; *Code of Va.* (1849), p. 214, &c.

A legacy may be either specific, demonstrative, or general (1). A specific legacy is a bequest of a specific part of the testator's personal

(1) "A specific legacy is a disposition of a certain thing, which may be known and distinguished from any other thing of the same kind," hence a bequest of "my East Haddam bank stock" is a specific legacy; *Brainerd v. Cowdry*, 16 Conn. R. 1; or, of "all my stock which I hold in the Union Bank of Pennsylvania;" *Blackstone v. Blackstone*, 3 Wat. R. 335; and, so, a bequest of a horse, or other individual thing, or money in a bag or drawer, is a specific legacy; *Mathis v. Mathis*, 3 Harrison's R. 59. "But if a sum of money is bequeathed, to be laid out in the purchase of lands, or to be vested in particular securities, it is a mere pecuniary legacy; for the legatee cannot, in that case, sever that from the general fund, so as to establish a right to the identical sum in specie. And thus he must be able to do, in order to make his legacy specific. Thus, in a bequest of stock, if the testator owned it at the time, it is specific; more especially, if it can be collected from the will, that the testator intended to confine the bequest to the stock he had on hand at the time of his death. As if the legacy be of *my* stock, or part of *my* stock, or in *my* stock. But if the testator did not *own* the stock when he made the will, or died, but directed it to be purchased out of his personal estate for particular persons; on the question whether these legacies were specific or pecuniary, it was held by the court, that they were pecuniary;" *White et al. v. Beattie*, exec., 1 Dev. E. R. 87, S. C. Id. 320. "So, a bequest by a testator to his wife in the following words: 'I wish her to take Stanford in her third of the property if she chooses,' is not a specific legacy of the slave to the wife, but only gives her the right to take him at a fair valuation, and if that valuation is more than her share, she must account for the surplus;" *Young et al. v. Carson*, adm'r, et al., 1 Dev. & Bat. R. 360. And, where a testator bequeaths bank stock generally, without saying it is the bank stock he owns, the bequest will be general and not specific. But when, after giving several legacies of bank stock, in giving another legacy of bank stock, he used this expression, "in case there should be any deficiency in the bank stock, which I hold at my death, as compared with the amount bequeathed in my will and testament," it was held, that he meant the stock which he should then have, and therefore the legacies were specific; *McGuire et al. v. Evans et al.*, 5 Ired. E. R. 269. For other instances of specific legacies, see *Cuthbert et al. v. Cuthbert et als.*, 3 Yeat. R. 486; *Stickney v. Davis*, 16 Pick. R. 21; *White v. Winchester*, 6 Id. 56; *Stout v. Hart et al.*, exec's, 2 Halst. R. 414; *Walton v. Walton*, 7 Johns. C. R. 262; *Lillard v. Reynolds*, 3 Ired. R. 370; *Chase v. Lockerman*, 11 Gill & Johns. R. 186; *Hammond v. Hammond*, 2 Bland's R. 314; *Perry, exec., v. Maxwell, exec.*, 2 Dev. E. R. 488; *Everitt v. Lane*, 2 Ired. E. R. 550; *Warren, exec., v. Wigfall et als.*, 3 Desauss. R. 47; *Wharley v. Wharley*, 1 Bail. E. R. 397; *Gilbreath v. Alban et al.*, 10 O. R. 64; *Howell et al. v. Hooks' adm'r*, 4 Ired. E. R. 188; *Christler's exec. v. Meddis, adm'r*, 6 B. Mon. R. 37; *Alsop's Appeal*, 9 Barr's R. 374; *Scholl v. Scholl*, 5 Barb. S. R. 312; *McGuire et al. v. Evans et al.*, 5 Ired. E. R. 269; *Bailey et al., exec's, v. Wagner et al.*, 2 Strobb. E. R. 1; *Ludlam's Estate* 1 Har. R. 188; *Buchanan v. Pue, jr., exec.*, 6 Gill's R. 112; *Van Wagener, exec., v. Baldwin et als.*, 3 Halst. C. R. 211; *Woods v. Sullivan*, 1 Swan's R. 507; *Hoke v. Herman*, 9 Har. R. 301; *Wallace v. Wallace*, 3 Fost. R. 149.

"If a thing bequeathed in a will by such a description as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, or if it be so changed that it cannot be called

estate. Thus a bequest of "the service of plate, which was presented to me on such an occasion," is specific, and so also is a bequest of

the same thing, the bequest is gone. If such a legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed if it be possible for the executor to give it to him; but if not, he cannot have money in place of it. This results from an inflexible rule of law applied to the mere fact, that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator." *Hoke v. Herman*, 9 Har. R. 301; *Blackstone v. Blackstone*, 3 Wat. R. 335; *Gilbreath v. Alban et al.*, exec's, 10 O. R. 64; *Newcomb, adm'r, v. St. Peter's Church et al.*, 2 Sandf. C. R. 637; *Alsop's Appeal*, 9 Barr's R. 374; *McGuire et al. v. Evans et al.*, 5 Ired. E. R. 269; *Bailey et al.*, exec's, *v. Wagner et al.*, 2 Strobh. E. R. 1; *Ludlam's Estate*, 1 Har. R. 188; *Beck v. McGillis*, 9 Barb. S. R. 35; but "a legacy is not extinguished or destroyed by a variation of the testator's interest, produced by operation of law; as where the bequest is of certain bank shares, and the charter of the bank expires, and the funds are conveyed to trustees, who divided the moneys received among the stockholders; and if the testator receives part of the dividends from the trustees, in his lifetime, it is an ademption *pro tanto* only;" *Walton v. Walton*, 7 Johns. C. R. 262; and where there is a bequest of the proceeds of a certain bond and mortgage, and the testator collects any portion of the mortgage debt, and appropriates it to other purposes, the legacy is so far adeemed, and the legatee will not be entitled to be reimbursed out of other property of the estate of the testator; but where the testator takes a bond of the purchaser of a part of the mortgaged premises for a proportionate account of the mortgage debt, but the mortgage is not released from the land sold, such bond and its proceeds are proceeds of the original bond and mortgage, and go to the legatee; *Gardi-*

ner et als., exec's, *v. Printup et als.*, 2 Barb. S. R. 83; so also, where a testator made a specific bequest of all notes of hand which were then payable to him, and was then in possession of four notes, signed by two persons, and afterwards, before his death, released one of the signers, and took new notes for the debt from the other signer, secured by a mortgage; it was held, that there was no ademption of the legacy; *Ford v. Ford*, 3 Fost. R. 212; and see also *Woods et al. v. Moore*, 4 Sandf. S. R. 589; *Van Wagner, exec., v. Baldwin et als.*, 3 Halst. C. R. 211; *Stout v. Hart et al.*, exec's, 2 Halst. R. 414; in the latter of which a distinction is taken between voluntary and compulsory payments, as regards the ademption of a specific legacy.

Specific legacies cannot be applied to the payment of the debts of the testator, until the general funds of the estate are exhausted; *Brainerd v. Cowdrey*, 16 Conn. R. 1; *White et al. v. Beattie, exec.*, 1 Dev. E. R. 320; *Wallace v. Wallace*, 3 Fost. R. 149.

"The courts are disinclined to recognize specific legacies, because of their liability to sink with the destruction of the thing bequeathed or the fund charged. But as it was obviously impossible to esteem as purely pecuniary many of the testamentary gifts which judges inclined to withdraw from the class of specific legacies, they were driven to borrow from the civilians a term thought to be descriptive of a species of donation holding a middle place between specific and pecuniary, the only kinds distinctly recognized when *Swineburne* wrote. They are called *demonstrative*, and, like general legacies, are gifts of mere quantity, but differ from these by being referred to a particular fund for payment. They are so far general, that if the particular fund be called in or fail, the legatees will be permitted to receive their legacies out of the general assets; yet so far specific as not to be subject to

"100*l.* consols, now standing in my name at the Bank of England (*o*)," or of "100*l.* consols, part of my stock (*p*)."^{*} A specific legacy must be paid or retained ^{*}by the executor in preference to those [^{*266}] which are general, and must not be sold for the payment of debts until the general assets of the testator are exhausted (*q*). It is, however, liable to *ademption* by the act of the testator in his lifetime. Thus, in the instances given above, if the testator should part with the plate, or sell the stock in his lifetime, the legacy will be adeemed, and the legatee will lose all benefit (*r*). A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund. Thus, "I bequeath to A. B. the sum of 50*l.* sterling, to be paid out of the sum of 100*l.* consols, now standing in my name at the Bank of England," is a demonstrative legacy. Such a legacy is not liable to *ademption* by the act of the testator in his lifetime; for it is considered to be the testator's intention that the legatee should at all events have the legacy; but that it should, if possible, be paid out of the fund he has pointed out. If therefore the testator in this case should sell the 100*l.* consols in his lifetime, the 50*l.* will still be payable to the legatee out of the general assets (*s*). A demonstrative legacy is accordingly

(*o*) Roper on Legacies, c. 3.

(*p*) Kirby v. Potter, 4 Ves. 750 a; Hayes v. Hayes, 1 Keen, 97; Shuttleworth v. Greaves, 4 My. & Cr. 35.

(*q*) Brown v. Allen, 1 Vern. 31; Hinton v. Pinke, 1 P. Wms. 539; Sletch v. Thorington, 2 Ves. sen. 560.

(*r*) Ashburner v. M'Guire, 2 Bro. C. C. 108.

(*s*) Roberts v. Pocock, 4 Ves. 150.

abatment, with general legacies, on a reference to the thing bequeathed, or deficiency of assets. They are thus specific in one sense, and pecuniary in another; to constitute a legacy specific. If it be specific, as given out of a particular fund, manifest there was a fixed and independent intent to give the legacy, separate and distinct from the property designated as the source of payment, the legacy of money, and not amounting to a gift of the fund itself, or any aliquot part of it, will be deemed general or demonstrative, the mention of the fund being considered though accompanied by a direction to pay rather by way of demonstration than condition—rather as showing how or by what it out of a particular estate or fund specially named." Walls v. Stewart, 4 Har. R. means the legacy may be paid, than 280. And see also, Enders, exec., v. Enders, 2 Barb. S. R. 362; In re Barklay's whether it shall be paid at all. * * * Estate, 10 Barr's R. 387; Bullic's Appeal, In this, as in other questions springing from the construction of wills, the intention of the testator is to be principally ascertained, and it is said to be necessary that the intention be either expressed in R. 149; Walton v. Walton, 7 Johns. C R. 262.

more beneficial to the legatee than a specific legacy. And it is also more beneficial than a legacy which is merely general; for being payable out of a specific fund, it is not, while that fund exists, liable to abatement with the general legacies (*t*). A general legacy is one payable only out of the general assets of the testator, and is liable to abatement in case of a deficiency of such assets to pay the testator's debts and other legacies. A bequest to A. of 100*l.* sterling is a general legacy; so is a bequest of 100*l.* consols, without referring to [*267] any particular* stock to which the testator may be entitled (*u*). A bequest of a mourning ring, of the value of 10*l.*, is also a general legacy, no specific ring of the testator's being referred to (*x*). In the two last cases, the executor would be bound to set apart or buy the stock, or purchase the ring for the legatee out of the general assets of the testator, supposing them sufficient for the purpose; and should there be a deficiency, the amount of the stock, or the value of the ring to be purchased, would abate proportionably. If, however, any legacy should be given for a valuable consideration, it will not be liable to abatement with the other general legacies. An example of this exception to the usual rule occurred in the case of legacies given by husbands to their wives in consideration of their releasing their dower (*y*). And by the act for the amendment of the law relating to dower (*z*), it is provided (*a*) that nothing therein contained shall interfere with any rule of equity or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

When a legacy is bequeathed by a testator to his creditor, it is considered to be a satisfaction of the debt, if the legacy be equal to or greater than the amount of the debt (*b*) (1). But if it be less than the

(*t*) *Acton v. Acton*, 1 Meriv. 178; *Livesay v. Redfern*, 2 Y. & C. 90.

(*u*) *Wilson v. Brownsmith*, 9 Ves. 180. See, however, *Townsend v. Martin*, 7 Hare, 471, qu?

(*x*) 1 Roper on Legacies, c. 3, s. 2.

(*y*) *Burridge v. Bradyl*, 1 P. Wms. 127; *Norcott v. Gordon*, 14 Sim. 258.

(*z*) Stat. 3 & 4 Will. IV. c. 105.

(*a*) Sect. 12.

(*b*) *Fowler v. Fowler*, 3 P. Wms. 353; *Fourdrin v. Gowdey*, 3 M. & K. 383, 409; 2 Roper on Legacies, c. 17, s. 1.

(1) A legacy will not be a satisfaction *Byrne et als.*, exec's, 5 Serg. & Raw. R. of the testator's debt, unless it was so 54, Judge Yeates, in deciding this principle. In the case of *Byrne et al. v.* ciple, uses the following language;—"A

debt (c), or payable at a different time (d), or of a different nature from *the debt (e), or if the debt be contracted subsequently [*268] to the date of the will (f), or if the will contain an express direction for payment of debts and legacies (g), the legacy will not be a

(c) *Graham v. Graham*, 1 Ves. sen. 262.

(d) *Nicholls v. Judson*, 2 Atk. 300; *Hales v. Darell*, 3 Beav. 324.

(e) *Alleyn v. Alleyn*, 2 Ves. sen. 37; *Bartlett v. Gillard*, 3 Russ. 149; *Fourdrin v. Gowdey*, 3 M. & K. 383, 409.

(f) *Cranmer's case*, 2 Salk. 508.

(g) *Richardson v. Greese*, 3 Atk. 65.

rule has prevailed, that whenever a person by his will, gives a legacy as great or greater than the debt he owes to the legatee, such legacy shall be a satisfaction of the debt, on the presumption that a man must be intended to be just before he is bountiful, and that his intent is to pay a debt, and not to give a legacy. The rule itself is not founded in reason, and often tends to defeat the bounty of testators; and able chancellors have thought it more agreeable to equity, to construe a testator to be both just and generous, where the interest of third persons are not affected. And courts of justice will now lay hold of slight circumstances to get rid of the rule. Legacies are considered as gratuities, and are always construed favourably. If they be less than the sum due, payable on a contingency, or a future day, on these and the like circumstances, they will be construed as additional bounties, and not as satisfactions. And although the contingency does not actually happen, and the legacy thereby becomes due, yet it shall not go in satisfaction of the debt, because a debt which is certain, shall not be merged or lost by an uncertain and contingent recompense. For whatever is to be a satisfaction of a debt, ought to be so in its creation, and at the very time it is given, which such contingent provision is not. * * * according to the most modern decisions, it is presumed, that the legacy must be in all respects, *eiusdem generis*, to cause a satisfaction of the debt, and an apparent intention in the will, that the testator

meant it as such." See also to the same effect, *Smith, exec., v. Marshall*, 1 Root's R. 159; *Strong v. Williams, exec.*, 12 Mass. R. 392; *Williams v. Crary*, 5 Cow. R. 370; S. C. 8 Id. 246, and 4 Wend. R. 449; *Byrne et al. v. Byrne et als., exec's*, 5 Serg. & Raw. R. 54; *Edelen's exec's v. Dent's adm'rs*, 2 Gill & Johns. R. 185; *Fitch v. Peckham, exe'x*, 16 Vt. R. 151; *Perry, exec., v. Maxwell, exe'x*, 2 Dev. E. R. 488; *Stagg v. Beekman*, 2 Edw. C. R. 89; *Van Riper et al. v. Van Riper et al., exec's*, 1 Green's C. R. 1; *Ward, exec., v. Coffield*, 1 Dev. E. R. 108; *Dey v. Williams et al.*, 2 Dev. & Bat. E. R. 66; *Ladson et al. v. Ward et al., exec's*, 1 Desauss. R. 315; *Caldwell's exec. v. Kinkhead et al.*, 1 B. Mon. R. 230; *Cloud v. Clinkenbeard's exec's*, 8 B. Mon. R. 398; *Waters v. Howard et al.*, 1 Md. C. Decs. 112.

Nor is a legacy by a creditor to his debtor, *prima facie*, a discharge or release of his debt: but if the will, or the declarations of the testator, before, at, or after the making of the will, show that such was his intention,—the law, always if possible, favouring the wishes of the decedent, will construe in accordance with that intention; *Clark v. Bogardus*, 12 Wend. R. 67; *Ricketts v. Livingston, exec.*, 2 Johns. Cas. 97; *Sorelle's exec's, v. Sorelle*, 5 Ala. R. 245; *Stagg v. Beekman*, 2 Edw. C. R. 89; *Zeigler et al., exec's, v. Eckhart*, 6 Barr's R. 13; *Lewis v. Thompson*, 2 Richard. E. R. 75; *Gallego v. Gallego's exec.*, 2 Brockenb. R. 291.

satisfaction. The leaning of the courts is against the doctrine of the satisfaction of debts by legacies, a doctrine which seems to have been established on rather questionable grounds. When, however, a sum of money is due to a child by way of portion, the inclination of the courts is against double portions; and a legacy to such child is accordingly regarded as a satisfaction of the portion either in part or in whole, notwithstanding such legacy may be less than the portion, or payable at a different period (*h*). A bequest of the residue, or of a share in the residue, of the testator's estate, will also be considered as a satisfaction pro tanto (*i*). The presumption of satisfaction is indeed so strong, that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both.

By a statute of George the Second, commonly called the Mortmain Act (*j*), no hereditaments, nor any money, stock in the public funds or other personal estate whatsoever to be laid out in the purchase of hereditaments, can be conveyed or settled for any charitable uses (with a few exceptions), otherwise than by deed, with certain formalities mentioned in the act (*k*). And all gifts of hereditaments, or [*269] of any estate or interest therein, or of *any charge or incumbrance affecting or to affect any hereditaments, or of any personal estate to be laid out in the purchase of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance, affecting or to affect the same, to or in trust for any charitable uses whatsoever, are rendered void if made in any other form than by the act is directed (*l*). This act has been very strictly construed, and has been held to prohibit the bequest for charitable purposes of personal estate in any degree savouring, as it is said, of the realty. Thus, it has been decided that money secured on mortgage of real estate (*m*), shares in a canal navigation (*n*), and leasehold estates (*o*), cannot be left by will for any charitable purpose. But more recently, the

(*h*) *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Weall v. Rice*. 2 Russ. & Myl. 251.

(*i*) *Rickman v. Morgan*, 2 B. C. C. 394; *Earl of Glengall v. Barnard*, 1 Keen, 769; affirmed 2 H. of L. Cas. 131.

(*j*) Stat 9 Geo. II. c. 36, s. 1.

(*k*) See Principles of the Law of Real property, 55, 1st ed.; 58, 2d ed.; 60, 3d ed.

(*l*) Sect. 3.

(*m*) *Attorney General v. Meyrick*, 2 Ves. sen. 44.

(*n*) *Howse v. Chapman*, 4 Ves. 542.

(*o*) *Attorney General v. Graves*, Amb. 155.

strictness of the courts appears to have relaxed; and it has lately been held that money secured by a policy of assurance, although the company may invest their funds in real estates (*p*), and shares in a banking company authorized to invest money on mortgage of real estates (*q*), are not within the statute. So railway scrip (*r*), and shares in gas companies (*s*), docks, railways, and canals (*t*), when such shares are declared by the acts establishing the undertakings to be personal estate, are unaffected by the statute. But debentures by which such undertakings with their rates and tolls are mortgaged, have been *recently held to be within the act (*u*); though [*270] such debentures as are mere bonds or covenants to pay money, and not mortgages, are clearly unaffected by it (*x*). With regard to the bequest of money to be laid out in the purchase of hereditaments, it has been decided that a bequest of money to be laid out in building on land already in mortmain is good (*y*); but if some land already in mortmain be not distinctly referred to, a bequest of money for building for any charitable purpose will be void, as implying a direction for the purchase of land on which to build (*z*). And it has also been held that a gift is void which tends directly to bring fresh lands into mortmain, as a gift of money to a charity on condition that other persons provide the land (*a*). But if the purchase of land be not involved in the gift, there is no law which prevents the bequest of purely personal property to any amount for charitable purposes. A bequest to a charity ought, therefore, to be directed to be paid out of such part of the testator's personal estate as he may lawfully bequeath for such a purpose. For if this precaution should be neglected, the charitable legacies will fail in the proportion which the personal assets

(*p*) *March v. Attorney General*, 5 Beav. 433.

(*q*) *Ashton v. Lord Langdale*, V. C. K. B. 15 Jur. 868, in opposition to *Myers v. Perigal*, 16 Sim. 533.

(*r*) *Ashton v. Lord Langdale*, *ubi supra*.

(*s*) *Thompson v. Thompson*, 1 Coll. 381; *Sparling v. Parker*, 9 Beav. 450.

(*t*) *Hilton v. Giraud*, 1 De Gex & Smale, 183; *Sparling v. Parker*, *ubi supra*; *Walker v. Milne*, 11 Beav. 507; *Ashton v. Lord Langdale*, *ubi supra*, overruling *Tomlinson v. Tomlinson*, 9 Beav. 459.

(*u*) *Ashton v. Lord Langdale*, *ubi supra*; see, however, *Walker v. Milne*, 11 Beav. 507; and *Myers v. Perigal*, 16 Sim. 533, *contra*.

(*x*) *Ashton v. Lord Langdale*, *ubi supra*.

(*y*) *Glubb v. Attorney General*, Ambl. 373.

(*z*) *Pritchard v. Arbouin*, 3 Russ, 456; *Smith v. Oliver*, 11 Beav. 481.

(*a*) *Attorney General v. Davies*, 9 Ves. 535; *Mather v. Scott*, 2 Keen, 172; *Trye v. Corporation of Gloucester*, 14 Beav. 173.

savouring of the realty may bear to those which are purely personal (*b*).

[*271] *Other bequests which require some care are those to *illegitimate children. It is very doubtful whether a bequest to the future illegitimate children of a particular woman is not void as tending to encourage immorality (*c*). And it is certain that a bequest to the future illegitimate children of a particular man is void, as the courts cannot enter into the inquiry which would be necessary to identify such children (*d*). A child *primâ facie* means a legitimate child: a bastard is considered by the law as *nullius filius*. Accordingly, an illegitimate child can never take under a gift to children, unless it be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken (*e*). An illegitimate child may, however, take under any gift in which he is sufficiently indentified as the object of the testator's bounty. Thus, a bequest to the child of which a woman is now pregnant is good (*f*). And if illegitimate children have acquired the reputation of being the children of the testator or any other person, and it appear by necessary implication on the face of the will that such persons were intended in a bequest to children, they will be entitled, not on account of their being children, but on account of their reputation as such (*g*).

After payment of the testator's debts and legacies, the residue of his personal estate must be paid over to the residuary legatee, if any, named in the will. A will of personal estate has always been considered as speaking from the death of the testator; and it is now [*272] expressly *enacted that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the

(*b*) Attorney General v. Tyndall, 2 Eden. 207; S. C. 2 Amb. 614; Hobson v. Blackburn, 1 Keen, 273; Philanthropic Society v. Kemp, 4 Beav. 581; and see Robinson v. Geldard, 3 Mac. & Gord. 735.

(*c*) See 2 Jarm. Wills, 153.

(*d*) Wilkinson v. Adams, 1 Ves. & Beames, 466; 2 Jarm. Wills, 155.

(*e*) Cartright v. Vawdry, 5 Ves. 530; Godfrey v. Davis, 6 Ves. 43; Harris v. Lloyd, 1 T. & Russ. 310; Bagley v. Mollard, 1 Russ. & M. 581; 2 Jarm. Wills, 140; Dover v. Alexander, 2 Hare, 275.

(*f*) Gordon v. Gordon, 1 Meriv. 141.

(*g*) Wilkinson v. Adam, 1 Ves. & B. 422; Gill v. Shelley, 2 Russ. & My. 336; Meredith v. Farr, 2 You. & Coll. 525.

death of the testator, unless a contrary intention shall appear by the will (*h*). Hence, it follows that all personal property acquired by the testator between the time of making his will and his decease, will pass under it. If any legacy should lapse by the death of the legatee in the testator's lifetime, or should fail from being contrary to law, it will fall into the residue, and belong to the residuary legatee. And a legacy will lapse by the death of the legatee in the testator's lifetime, although given to the legatee, his executors, administrators and assigns (*i*), for these words are merely inserted in analogy to the limitation of real estate to a man and his heirs. If a bequest be made to two or more as joint tenants, and one of them die in the lifetime of the testator, his share will not lapse but will survive to the others (*k*). But if the bequest be to two or more in common, and one of them die in the testator's lifetime, his share will lapse (*l*); unless the bequest be made to a class, as to the children of A. in equal shares, in which case all who answer that description at the testator's decease (*m*), and also (if the period of distribution be postponed by the will) all who come into being before such period (*n*), will be entitled to divide the bequest amongst them. It is, however, provided by the recent act for the amendment of the laws with respect to wills, that where any person, being a child or other issue of *the testator, to whom [*273] any personal estate shall be bequeathed for any interest not determinable at or before the death of such person, shall die in the testator's lifetime leaving issue, and any such issue shall be living at the death of the testator, such bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*o*)(1). The effect of this provision is curious. If the legatee

(*h*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 24.

(*i*) Elliot v. Davenport, 1 P. Wms, 83.

(*k*) Morley v. Bird, 3 Ves. 628, 631.

(*l*) Bagwell v. Dry, 1 P Wms. 700; Page v. Page, 2 P Wms. 489; Barber v. Barber, 3 My. & Craig, 688; Bain v. Lescher, 11 Sim. 397.

(*m*) Viner v. Francis, 2 Cox, 190; 2 Jarm. Wills, 74; Lee v. Pain, 4 Hare, 250.

(*n*) Ayton v. Ayton, 1 Cox, 327; 2 Jarm. Wills, 75.

(*o*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 33.

(1) Statutes resembling this provision including devises as well as legacies within are in force in most of the states of the the letter of the acts, and embracing other Union; but in many of them, these en- than lineal descendants. Thus, in New actments are more comprehensive than Hampshire, "The heirs in the descending those prescribed by the laws of England, line of any devisee or legatee deceased be-

had died immediately after the testator, leaving a will, it is evident that the estate bequeathed to him would have passed under his

fore the testator, shall take the estate devised or bequeathed, in the same manner the legatee or devisee would have taken the same if he had survived." N. H. Compil. Stats. (1853), pp. 400, 401, sec. 11. The same is true of the laws of Pennsylvania, which also contain provisions in favour of brothers and sisters and their children, as regards such devises or legacies; as will be seen by a reference to *Purd. Dig.* (1853), p. 844, secs. 14 and 15, which are in these words. "No devise or legacy in favour of a child or other lineal descendant of any testator, shall be deemed or held to lapse, or become void, by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favour of such surviving issue, with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise. No devise or legacy hereafter made in favour of a brother or sister, or the children of a deceased brother or sister of any testator, such testator not leaving any lineal descendants, shall be deemed or held to lapse, or become void by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favour of such surviving issue, with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise."

In Georgia, it is enacted that "From and after the passage of this act, where any person named as legatee in the will of any other person, shall die before the testator, leaving issue, that shall be alive at the death of such testator, the legacy, provided, the same be absolute and without remainder, or limitation, shall not lapse as here-

tofore, but shall vest in such issue." T. R. R. Cobb's *New Dig. of the Ls. of Geo.* (1851), Vol. 1, p. 348, sec. 194.

In some of the states it is provided in addition to what has been already stated, that the devise or legacy so left to a legatee or devisee who has died, shall go to his child or children, as if he had died intestate,—and in New Jersey, it is expressly said, that this shall be the case, even where the deceased devisee or legatee has left a will; for to quote the words of the act, "Whosoever any estate of any kind shall or may be devised or bequeathed by the testament and last will of any testator or testatrix, to any person, being a child or other descendant of such testator or testatrix, and such devisee or legatee shall, during the life of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children who shall survive such testator or testatrix, in that case, such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix, shall not lapse, but the estate so devised or bequeathed, shall vest in such child or children, descendant or descendants, of such legatee or devisee, in the same manner, as if such legatee or devisee had survived the testator or testatrix, and had died intestate," &c. *Elmer's Dig. of the Ls. of N. J.*, p. 601, sec. 32.

For such differences as have been noticed existing between the statutes of the several states, see *Dallam's Dig. of the Ls. of Tex.*, p. 244; *Code of Va.* (1849), pp. 517, 518, sec. 13; *Revis. Stats. of N. Y.* (3d ed.), Vol. 2, p. 126, sec. 44; *Revis. Stats. of Vt.* (1839), pp. 257, 258, sec. 28; *Dorsey's Ls. of Md.*, Vol. 1, p. 598, sec. 4; *Revis. Stats. of Maine*, p. 377, sec. 19; *Revis. Stats. of N. C.* (1836-7), Vol. 1, p. 623, sec. 15; *Loughborough's Dig. of Ky. Stats.*, p. 400; *Stats. of S. C.*, Vol. 5, p. 107, sec.

will. It has been decided therefore that the will of the legatee shall, after his death, operate on the estate bequeathed to him in the same manner as if he had been living (*p*). But this provision has been held not to apply to a testamentary appointment (*q*).

If there were no residuary legatee, the residue of the testator's personal estate, after payment of debts and legacies, formerly belonged to the executor for his own benefit, unless a contrary intention appeared from his being left executor in trust (*r*), or from his having a legacy left him for his trouble (*s*), or from other circumstances (*t*). But by a recent statute (*u*), it is now enacted that when any person shall die, having by will or codicil appointed any executor, such executors shall be deemed by courts of equity to be a trustee for the person or persons (if any) who would be entitled to the *estate [274] under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto (*x*), that the person so appointed executor was intended to take such residue beneficially. The Statute of Distributions is that under which the personal estate of any one dying intestate is distributed between his widow and next of kin. An account of this statute will be found in the next chapter.

(*p*) *Johnson v. Johnson*, 3 Hare, 157.

(*q*) *Griffiths v. Gale*, 12 Sim. 354.

(*r*) *Pring v. Pring*, 2 Vern. 99; *Bagwell v. Dry*, 1 P. Wms. 700.

(*s*) *Rachfield v. Careless*, 2 P. Wms. 158.

(*t*) *Mullen v. Bowman*, 1 Coll. 197.

(*u*) Stat. 11 Geo. IV. & 1 Will. IV. c. 40.

(*x*) *Lane v. Gaze*, 8 Beav. 472.

9; *Ls. of Tenn.* (Supplem. 1846), p. 147, sec. 50; and Act of the Legislature of California "concerning Wills," approved Apr. sec. 14; *How. & Hutch. Stat. Ls. of Missi.*, 10, 1850, sec. 20. p. 386, sec. 5; *Stats. of O.* (1841), p. 999,

*CHAPTER IV.

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OF INTESTACY.

THE ecclesiastical courts have jurisdiction not only over the wills of testators, but also over the goods of persons dying intestate. This jurisdiction, though of long standing, appears to have been at first gradually acquired. In early times the clergy, being possessed of almost all the learning, appear to have been the principal framers of wills. The power they thus acquired was exercised for their own benefit, every man being expected, on making his will, after bequeathing to his lord his heriot, in the next place to remember the church (a). If, however, a man should have died intestate, without opportunity of making this provision, the distribution of his goods devolved on the church, together with his friends, the lord first having taking his heriot (b). The wife and the children were entitled to their shares; and that part of the goods which the intestate had power to dispose of by his will (called the portion of the deceased) was applied by the church *in pios usus*, This application to pious uses appears to have been as follows: in the first place, the bequest, which it was to be presumed the intestate would have made to the church, was retained, and the residue was then disposed of in paying the debts of the deceased, and distributed amongst his wife and children, his parents and their relatives. That this was the case appears from the complaints which were made by the clergy of those days, of the interference of the temporal lords in cases of intestacy, whereby the distribution of

[*276] the effects in the manner pointed out was prevented (c).* The clergy themselves, however, do not appear to have been always free from blame; for they are accused of having frequently taken the whole of the intestate's portion to themselves, making no distribution, or at least an undue one, amongst the creditors and relatives of the

(a) Glanville, lib. 7, c. 5; Bract. 60 a; Fleta, lib. 2, c. 57.

(b) Bract. 60, b.; Fleta, ubi supra.

(c) Matthew Paris, 951, Aditamenta, 201, 204, 209, (Wats's ed. London, 1640): Constitutions of Boniface, Constitutiones Provinciales, 20, at the end of Lindewood's Provinciale (Oxon. 1679), recited also in a Constitution of Archbishop Stratford (Lynd. Prov. lib. 3, tit. 13). See Gent. Mag. New Series, vol. ii. 355, 474. See also Dyke v. Walford, Privy Council, 12 Jurist, 839.

deceased (*d*); and, in order to remedy this evil, it was enacted in the reign of Edward I., by one of the very few statutes then passed relating to personal estate (*e*), that the ordinary should be bound to answer the debts of an intestate, so far as his goods would extend, in the same manner as the executors would have been bounden if he had made a testament. The right of the creditor was thus clothed with a remedy; for, under this statute, an action at law might be brought by the creditor against the ordinary for the payment of his debt (*f*); but the right of the relatives to the surplus still remained undefined.

The duty of administering intestate's effects was not, as may be supposed, usually performed by the bishops in person. For this purpose they usually appointed an administrator; but, as personal property rose in importance, it became desirable that this administrator should not be considered as the mere agent of the bishop, but should himself have a *locus standi* in the king's courts. It was accordingly enacted by a statute of the reign of Edward III. (*g*) that where a man died intestate the ordinaries should depute the next and most lawful friends *of the deceased to administer his goods, [*277] which persons so deputed should have action to demand and recover as executors, the debts due to the deceased, to administer and dispend for the soul of the dead; and should answer also, in the king's courts, to others to whom the deceased was holden and bound, in the same manner as executors should answer. By a subsequent statute (*h*) administration may be granted to the widow of the deceased or to the next of his kin, or to both, as by the discretion of the ordinary shall be thought good. The widow is usually preferred to the next of kin in the grant of administration (*i*); and a joint grant is seldom made, so seldom, indeed, that the powers of co-administrators appear to be still a matter of doubt (*j*). In granting administration to the next of kin, the ecclesiastical courts are guided by the right to the property to be administered (*k*). This right will be here-

(*d*) Fleta, lib. 2, c. 57.

(*e*) Stat. 18 Edw. I. c. 19.

(*f*) 1 Ro. Abr. 906; Bac. Abr. tit. Executors and Administrators (E).

(*g*) 31 Edw. III. c. 11.

(*h*) 21 Hen. VIII. c. 5.

(*i*) Webb v. Needham, 1 Adams, 494.

(*j*) Shep. Touch. 485, 486; Williams on Executors, pt. 3, bk. 1, c. 2.

(*k*) In the goods of Gill, 1 Hagg. 342.

after explained. If none of the next of kin will take out administration, a creditor may, by custom, do so, on the ground that he cannot be paid his debt until representation is made to the deceased (*l*); and for want of creditors, administration may be granted to any person at the discretion of the court (*m*) (1).

(*l*) *Webb v. Needham*, 1 *Adams*, 494.

(*m*) *Williams on Executors*, pt. 1, bk. 5, c. 2, s. 1.

(1) In the state of New York, "Administration, in case of intestacy, shall be granted to the relatives of the deceased, who would be entitled to succeed to his personal estate, if they or any of them will accept the same, in the following order: First, to the widow; second, to the children; third, to the father; fourth, to the brothers; fifth, to the sisters; sixth, to the grandchildren; seventh, to any other of the next of kin who would be entitled to share in the distribution of the estate. If any of the persons so entitled be minors, administration shall be granted to their guardians; if none of the said relatives or guardians will accept the same, then to the creditors of the deceased; and the creditor first applying, if otherwise competent, shall be entitled to a preference; if no creditor apply, then to any other person or persons legally competent; but in the city of New York, the public administrator shall have preference after the next of kin, over creditors and all other persons. And in the case of a married woman dying intestate, her husband shall be entitled to administration, in preference to any other person, as hereinafter provided.

"Where there shall be several persons of the same degree of kindred to the intestate, entitled to administration, they shall be preferred in the following order: First, males to females; second, relatives of the whole blood to those of the half blood; third, unmarried woman to such as are married; and when there are several persons equally entitled to administration, the surrogate may, in his discretion, grant letters to one or more of such persons."

Revis. Stats. of N. Y. (3d ed.), p. 138, secs. 28 and 29.

In Massachusetts, "Administration of the estate of an intestate shall be granted to some one or more of the persons hereinafter mentioned; and they shall be respectively entitled thereto, in the following order, to wit:

"First, his widow, or next of kin, or both, as the judge of probate shall think fit; and if they do not voluntarily either take or renounce the administration, they shall, if resident within the county, be cited by the judge for that purpose.

"Secondly, if the persons so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect, without any sufficient cause, for thirty days after the death of the intestate, to take administration of his estate, the judge of probate shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust.

"Thirdly, if there be no such creditor, the judge shall commit administration to such other person as he shall think fit; provided, however,

"Fourthly, that if the deceased were a married woman, administration of her estate shall in all cases be granted to her husband, if competent and willing to undertake the trust, unless she shall, by force of a marriage settlement or otherwise, have made some testamentary disposition of her separate estate, or some other provision, which shall render it necessary or proper to appoint some other person to administer her estate; and provided also,

The administrator, when appointed, has the same right to, and power over, all the personal estate of the intestate as his executors would have had if he had made a will (*n*), and this right and power relate back to the time of the intestate's decease (*o*). The same duty also *devolves upon the administrator of paying the debts in the first place. He has also the same privilege as an executor of retaining his own debt in preference to all others of the same degree (*p*). But the surplus, after payment of the debts, must be

(*n*) Williams on Executors, pt. 2, bk. 1, ch. 1.

(*o*) *Tharpe v. Stallwood*, 5 Man. & Gran. 760; **Foster v. Bates*, 12 M. & W. 226; **Welchman v. Sturgis*, 13 Q. B. 552.*

(*p*) *Warner v. Wainsford*, Hob. 127; Williams on Executors, pt. 3, bk. 2, ch. 2, s. 6.

"Fifthly, that if the deceased were an alien, and left no widow or next of kin in this state, administration of his estate shall be granted to the consul or vice-consul of the nation to which he belonged, if there be any in this state, in preference to his creditors." Revis. Stats. of Mass. (1836), p. 425, sec. 4.

In Pennsylvania, "Whenever letters of administration are by law necessary, the register having jurisdiction shall grant them in such form as the case shall require, to the widow, if any, of the decedent, or to such of his relations or kindred as by law may be entitled to the residue of his personal estate, or to a share or shares therein after payment of his debts, or he may join with the widow in the administration, such relation or kindred, or such one or more of them, as he shall judge will best administer the estate, preferring always of those so entitled, such as are in the nearest degree of consanguinity with the decedent, and also preferring males to females, and in case of the refusal or incompetency of every such person, to one or more of the principal creditors of the decedent applying therefor, or to any fit person at his discretion: Provided, That if such decedent were a married woman, her husband shall be entitled to the administration in preference to all other persons: And provided further, That in all cases of an administration with the will annexed, where there is a general

residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue, and the administration in such case shall be granted by the register to such one or more of them as he shall judge will best administer the estate." *Purd. Dig.* (1853), p. 191, sec. 26.

For the statutes of the several States on this subject, see *N. H. Compil. Stats.* (1853), p. 404, sec. 2; *Dallam's Dig. of the Ls. of Tex.*, p. 11, sec. 2; *Cobb's New Dig. of the Ls. of Geo.* (1851), Vol. 1, p. 305, sec. 59; *Thompson's Dig. of the Ls. of Fla.*, p. 196, sec. 5; *Code of Va.* (1849), p. 541, sec. 4; *Revis. Stats. of Vt.* (1839), pp. 263, 264, sec. 3; *Michi. Revis. Stats.*, p. 280, sec. 4; *Clay's Ala. Dig.*, p. 220, sec. 1, and p. 222, sec. 10; *Dorsey's Ls. of Md.*, Vol. 1, p. 382 to 386; *Revis. Stats. of Maine*, p. 435, secs. 1 and 2; *Elmer's Dig. of the Ls. of N. J.*, p. 164, sec. 1, and p. 165, sec. 10; *Civil Code of La.*, arts. 1114 to 1117; *Revis. Stats. of N. C.* (1836-7), Vol. 1, p. 272, sec. 2; *Morehead & Brown's Dig. of Ky. Stats.*, Vol. 1, pp. 661, 662, secs. 29 and 30; *Stats. of S. C.*, Vol. 1, pp. 108, 109, sec. 16; *Caruthers & Nicholson's Stats. Ls. of Tenn.*, p. 72, sec. 8; *Ls. of Dela. Revis. Code*, (1852), p. 297, sec. 9; *Dig. of the Stats. of Ark.*, p. 111, secs. 6, 7 and 8; *How. & Hutch. Stat. Ls. of Missi.*, p. 395, sec. 35; *Stats. of O.* (1841), p. 341, sec. 12.

distributed amongst the relatives of the intestate in proportions to be hereafter mentioned. In order to enable the administrator to inform himself of the state of the assets, and to pay the debts of the deceased the same period of a year from the time of the decease as is allowed to an executor is also given to the administrator before he can be required to make any distribution (*q*). But, notwithstanding this delay, the interest of the persons entitled to the surplus vests in them from the time of the decease of the intestate; so that in case any of them should die within a twelvemonth after the decease of the intestate, the share of the person so dying will pass to his own executors or administrators (*r*).

In some instances administration is granted for a limited purpose, or confined to a given time. Of this we have already had an instance in the case of administration *durante minore ætate*, when the sole executor named in a will is under age (*s*); and the same sort of administration is granted on intestacy, in case of the minority of the next of kin (*t*). So if the executor or next of kin, as the case may be, should be out of the realm at the time of the decease of the testator or intestate, the ecclesiastical court will grant a limited administration *durante absentia*, which will expire the moment of the return of such executor or next of kin. And if the executor should prove the will, [*279] and afterwards go *to reside out of the jurisdiction of the English courts, the ecclesiastical court, which granted probate of the will, is empowered by act of parliament (*u*) to grant administration, at the end of a year from the testator's death, limited for the purpose of the administrator's being made a party to a bill in chancery for carrying the decree of that court into effect; but where there are no proceedings in chancery, the act does not apply (*x*). Again, when a suit concerning the right of administration is pending in the ecclesiastical court, if the effects of the deceased are in the meantime in jeopardy, that court will appoint some fit person as an administrator *pendente lite*, to collect and take care of the estate; for which purpose he may maintain actions to recover the debts due to the deceased;

(*q*) Stat. 22 & 23 Car. II. c. 10, s. 8.

(*r*) *Edwards v. Freeman*, 2 P. Wms. 442.

(*s*) *Ante*, p. 255.

(*t*) *Williams on Executors*, pt. 1, bk. 5, ch. 3, s. 3.

(*u*) Stat. 38 Geo. III. c. 87, ss. 1-5.

(*x*) *Williams on Executors*, pt. 1, bk. 5, ch. 3, s. 5.

but he has no authority to make any distribution (*y*). So if a will should have been made, but the executors should have renounced, or died before their testator, the ecclesiastical court will appoint the person having the greatest interest in the effects, generally the residuary legatee, to administer the same according to the directions of the will, in which case the administration granted is termed an administration *cum testamento annexo*, with the will annexed (*z*)(1).

With regard to the court from which administration ought to be taken out, the same rule of *bona notabilia* which governs the probate of wills (*a*) decides also the taking out of letters of administration. Letters of administration are also, as well as probates, liable to the payment of an *ad valorem* stamp duty on the value of the personal estate of the deceased within the jurisdiction* of the spiritual judge who grants the administration; but the duty on letters of administration, where there is no will, is after a higher rate than the duty on probates, or on letters of administration with the will an-

(*y*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 4..

(*z*) Ibid. pt. 1 bk. 5, ch. 3, s. 1.

(*a*) See ante, p. 259.

(1) In addition to the several kinds of administrators above mentioned, there is also a special administrator, or an administrator *ad colligendum*, who may be appointed by the officer having the proper authority, according to his discretion, for the purpose of preserving the estate of the decedent, until regular letters testamentary or of administration are granted, or until the will is established, and in such like cases.

In the State of Maryland, for example, it is provided, that "In case of delay, on account of the absence from the State of an executor, executrix or executors, named in a will, or of a contest relative to the right of administration, or of a contested will or codicil, or of the negligence of any executor or executrix, named in the will, to take out letters testamentary, or the absence or negligence of any person entitled to letters of administration, or on any other account, the Orphans' Court of the county wherein the will was proved or authenticated, or where letters of admin-

istration ought to be granted, may, at discretion, issue letters, authorizing the collection and preservation of the goods of the deceased, and the returning an inventory thereof; and the said letters may, at discretion of the court, be directed to one person only, or to several persons, in case the goods or chattels and personal estate of the deceased shall be supposed to be in different counties." Dorsey's Ls. of Md., Vol. 1, p. 379, sect. 14.

And see for the provisions of the different States, Cobb's New Dig. of the Ls. of Geo. (1851,) p. 283, sect. 6, and p. 311; sect. 73; Thompson's Dig. of the Ls. of Fla., p. 198, sect. 1; Revis. Stats. of N. Y., (3d ed.) p. 140, sects. 39, 40; Revis. Stats. of Mass., (1836,) p. 426, sect. 6; Revis. Stats. of Maine, p. 445, sect. 13; Revis. Stats. of N. C., (1836-7,) Vol. 1, p. 273, sects. 4 and 5; How. & Hutch. Stat. Ls. of Missi., pp. 391, 392, sect. 24; Stats. of O., (1841,) p. 342, sect. 14; Clay's Ala. Dig. p. 222, sect. 8.

nexed (b). A heavy penalty is imposed by the Stamp Act on any person who shall take possession of, or in any manner administer any part of the personal estate of any deceased person, without obtaining probate or administration within six calendar months after his or her decease, or within two calendar months after the determination of any suit or dispute respecting the will or the right to administration (c). The same exemptions from duty in favor of seamen, marines, and soldiers, and also in favour of small depositors in savings' banks, which have been established with respect to the probate duty (d), apply also to the duty on letters of administration.

The office of administrator is not transmissible, like the office of executor (1). On the decease of an administrator, before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So if an executor should die intestate, without having completely distributed his testator's effects, an administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor (e). In each of these cases, the administration granted is called an administration *de bonis non administratis*, of the goods not administered, or, more shortly, *de bonis non* (f).

[*281] *The application of an intestate's effects, after payment of his debts, is now regulated by statutes of the reign of Charles II. and James II. (g), commonly called the Statutes of Distribution, by which statutes the rights of the relations of the deceased appeared to have been first definitively ascertained, and rendered legally available (2). Under these statutes, if the intestate leave a widow and any child or children, or descendant of any child, the widow shall take a third part of the surplus of his effects. If he leave no child, nor descendant of any child, she shall have a moiety. In this respect, the distribution

(b) Stat. 55 Geo. III. c. 184.

(c) 100%, and ten per cent. on the stamp duty. Stat. 55 Geo. III. c. 184, s. 37.

(d) Ante, p. 261.

(e) Shep. Touch. 465; Williams on Executors, pt. 1. bk. 3, ch. 4.

(f) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 2

(g) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7; see Watkins on Descents, Appendix, 257, et seq. 4th edit.

(1) See ante, p. 256, note.

slightly differing from each other, are but

(2) Each State of the Union has its variations of the Statutes of Chas. II. and own Statute of Distributions; and these James II.

is the same as took place under the ancient law. The husband of a married woman is entitled to the whole of her effects (*h*). If the intestate leave children, two-thirds of his effects if he leave a widow, or the whole if he leave no widow, shall be equally divided amongst his children, or, if but one, to such one child. But the descendants of such children as may have died in the intestate's lifetime, shall stand in the place of their parent or ancestor (*i*). Such children, however, as have been advanced by the parent in his lifetime must bring the amount of their advancement into hotchpot, so as to make the estate of all the children to be equal, as nearly as can be estimated. But the heir at law, notwithstanding any lands he may have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land (*k*). If the intestate leave no children or representatives of them, his father, if living, takes the whole; or, if the intestate should have left a widow, one-half. If the father be dead, the mother, *brothers and sisters of the intestate shall take in [*282] equal shares (*l*), subject, as before, to the widow's right to a moiety; and brothers or sisters of the half blood have an equal claim with those of the whole blood (*m*). If any brother or sister shall have died in the lifetime of the intestate, leaving children, such children shall stand in *loco parentis*, provided the mother or any brother or sister be living (*n*). If there be no brother or sister, nor child of such brother or sister, the mother shall take the whole, or, if the widow be living, a moiety only, as before; but a stepmother can take nothing (*o*). If there be no mother, the brothers and sisters take equally, the children of such as may be dead standing in *loco parentis*. Beyond brothers' and sisters' children, no right of representation belongs to the children of relatives with respect to the shares which their deceased parents would have taken. And if there be neither brother, sister, nor mother of the intestate living, his personal estate will be distributed in equal shares amongst those who are next in degree of kindred to him.

In tracing the degrees of kindred, in the distribution of an intes-

(*h*) Stat. 29 Car. II. c. 3, s. 25.

(*i*) See Burton's Compendium, pl. 1402.

(*k*) Stat. 22 & 23 Car. II. c. 10, s. 5.

(*l*) Stat. 1 Jac. II. c. 17, s. 7.

(*m*) *Jessop v. Watson*, 1 My. & K. 665; *Burnet v. Mann*, 1 My. & K. 672, n.

(*n*) *Lloyd v. Tench*, 2 Ves. sen. 215; *Durant v. Prestwood*, 1 Atk. 454; West. 448.

(*o*) *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 216.

tate's personal estate, no preference is given to males over female, nor to the paternal over the maternal line (*p*), nor to the whole over the half blood, as in the case of descent of real estate; nor does the issue stand in the place of the ancestor. The degrees of kindred are reckoned according to the civil law, both upwards to the ancestor and downwards to the issue, each generation counting for a degree (*q*).

[*283] Thus from father *to son, or from son to father, is one degree; from grandfather to grandson, or from grandson to grandfather, is two degrees; and from brother to brother is also two degrees, namely one upwards to the father, and one downwards to the other son. So from uncle to nephew is three degrees, one upwards to the common ancestor, and two downwards from him; and from nephew to uncle is also three degrees, two upward and one downwards. If therefore there be neither issue, father, brother, sister nor mother of the intestate living, such persons as are his next of kin, according to the rule above laid down, are entitled in equal shares *per capita* to his personal estate, subject to his wife's right to a moiety should she survive him. As the kindred becomes more distant, the number of persons entitled, if living, as well as the difficulty of proving their respective pedigrees, becomes prodigiously augmented. "It is at the first view astonishing," says Blackstone (*r*), "to consider the number of lineal ancestors which every man has within no very great number of degrees: and so many different bloods is a man said to contain in his veins as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents: he hath four in the second, the parent of his father and the parents of his mother: he hath eight in the third, the parents of his two grandfathers and two grandmothers: and, by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate." The number of collateral relations who may claim through such ancestors is of course far more numerous.

[*284] *The estates of intestate freemen of the city of London (*s*) and of persons having their fixed or general residence within the archiepiscopal province of York (excepting the diocese of Chester)

(*p*) *Moor v. Barham*, 1 P. Wms. 53.

(*q*) *Mentney v. Petty*, Pre. Cha. 593; *Wallis v. Hodson*, 2 Atk. 117; 2 Black. Com. 504, 515.

(*r*) 2 Black. Com. 203.

(*s*) *Onslow v. Onslow*, 1 Sim. 18.

are distributed according to peculiar customs, apparently derived from the ancient mode of distribution (*t*). Some parts of Wales also appear to be still subject to peculiar customs of distribution: for these several customs, though postponed to the right of testamentary disposition by the statutes to which we have already referred (*u*), were nevertheless not abolished by those statutes in the event of no will being made.

The shares of persons claiming any personal estate of the amount or value of 20*l.* or upwards under an intestacy, are subject to the same duty as legacies to persons of the same degree of kindred (*v*). If there be no next of kin, the crown, by virtue of its prerogative, will stand in their place (*x*), but subject always to the widow's right to a moiety in case she should survive (*y*).

The division of the personal estate of an intestate, effected by the Statute of Distributions, is remarkable for its fairness. The only provision which might be amended is that which places the half-blood on an equality with the whole. A corresponding equality in interest and feeling but rarely exists in actual life. The proper place for the half-blood appears to be that now assigned to them in descent of real estate, according to the recommendation of the Real Property Commissioners, *namely, next after those of the same degree of the whole [*285] blood (*z*). The appointment of an executor or administrator, in whom the whole personal property is vested, with full power of disposition, tends greatly to simplify the title to leasehold estates and other property of a personal nature. It could be wished, however, that the office of an administrator were transmissible in the same manner as that of an executor. And the circumstance of the personal estate of deceased persons being under the jurisdiction of the ecclesiastical courts, is not one of the considerations which would induce a preference of the system adopted in regard to the personal property of an intestate, over that which exists with respect to his real estate. In other respects, however, the distribution of personal estate on intestacy approaches far more nearly to the disposition which the deceased himself would probably have made, than the descent of real property, either at the common law or according to the customs of

(*t*) Williams on Executors, pt. 3, bk. 4, ch. 2.

(*u*) Ante, p. 250.

(*v*) Stat. 55 Geo. III. c. 184. See ante, p. 264.

(*x*) See stat. 15 & 16 Vict. c. 3.

(*y*) Cave v. Roberts, 8 Sim. 214.

(*z*) See Principles of the Law of Real Property, 77, 1st ed.; 82, 2d ed.; 86, 3d ed.

gavelkind. A person possessed only of small landed property usually devises it to trustees for sale, with full power to give receipts to purchasers, and directs the division of the produce by his trustees amongst his children in such shares as he may think just, with regard to the provision already made for any of them in his lifetime. He does not leave his younger children to beggary in order that his whole property may devolve to his eldest son according to the course of the common law, a course pursued, as the author believes, in no other civilized country in the world (*a*). Neither does he leave it to all his sons equally in undivided shares, thus inflicting an injustice on his daughters, and allowing all plans for the improvement of the lands to be checked by one dissentient voice, unless a partition should [*286] be resorted to, by which the property would be *split up into parcels too small for the convenience of agriculture. If by any accident a man should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention. It is true that when property is large, it is usually entailed on the eldest son and his issue, subject to moderate portions for the younger children. This custom of primogeniture is suited to the institutions of our country, and to the habits of the class to which large landed property usually belongs, and the author has no wish to see it disturbed. The settlements, however, by which these entails are created are more frequently made by deed than by will. They almost invariably contain provisions for the portions of younger children, varying in amount with the value of the property; and, whether made by deed or will, they are usually long and intricate in their nature, providing for the numerous contingencies which may arise under the peculiar circumstances of each family. Nothing in fact can be more different than the devolution of an estate to the eldest son under a family settlement, and the descent on an intestacy to the eldest son as heir at law. In the one case he takes subject to the proper claims of the other members of his family; in the other he is bound to them by no obligation at all. There seems to be no method of making, in case of intestacy, any sort of disposition of landed property which might be reasonably simple, and at the same time resemble an ordinary family settlement. If such a settlement be not made by deed, the owner has ample power of effecting the same object by his will. Intestacy, in fact, rarely happens to the owner of

(*a*) Co. Litt 191 a, n. (1), vi. 4

large landed property. The property which descends to heirs under intestacies, though large in the aggregate, is generally small in individual cases. When the wishes of all cannot be consulted, that which would have been the wish *of the generality of intestates [287] ought apparently to form the foundation of the rule. From a consideration of these circumstances the reader may perhaps be induced to think, that if, in case of intestacy, the rules for the devolution of real and personal estate were identical, and with some slight variations similar to those which now exist as to personalty, the law on this subject would be rendered both more simple and more just.

The descent of real estate to distant heirs, and the devolution of personalty to distant kindred, involve an amount of learning and litigation, the abolition of which would perhaps be desirable. The family and near relations of an intestate have generally claims upon his bounty, which ought not to be disappointed by the accident of his decease without making a will. But distant relatives have seldom any such claims, nor consequently any expectation of such claims being fulfilled. To withhold from them, therefore, that which they had never expected to enjoy, would not be to inflict a loss. Under the present system, the property of an intestate who has no near relations, is not unfrequently frittered away in expensive contests between opposing claimants, or else it devolves unexpectedly upon persons who, for want of previous education, are unable to make use of it with benefit either to themselves or to the community. In a country so heavily burdened as our own, any addition to the public income, not having the pressure of a tax, would be a very desirable acquisition. Such an addition might, as it appears to the author, be very properly made by the devolution to the public of the properties of intestates having none but distant relatives. The country in which a man has lived, and in which his property has been acquired, or at any rate protected, has certainly some claims upon him,—claims which seem preferable to those of the man who, in the case of real estate, founds his title on his descent from the *most* *remote male paternal [288] ancestor of the intestate (*b*), or who claims a share in the personalty because he chances to be a survivor amongst the multitude standing in the fifth or sixth degree of a series of kindred, which increases, as it grows distant, in geometrical progression (*c*).

(*b*) See Principles of the Law of Real Property, 78, 1st ed.; 83, 2d ed.; 87, 3d ed.

(*c*) The author's attention has since been called to a similar proposal in Mill's Political Economy, vol. 1, pp. 272, 273, 2nd ed.

[*289] *CHAPTER V.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

MARRIAGE being essential to the welfare of the community, and also involving important consequences to the individuals concerned, is not on the one hand allowed to be unduly restrained, nor on the other to be brought about by unfair means.

Amongst the many striking differences between the laws of real and personal property, by which our legal system is complicated, will be found the rules relating to attempted restraints on marriage. Real estate is governed by the rules of the common law; but personal estate when bequeathed by will has, as we have seen (*a*), long been subject to the jurisdiction of the ecclesiastical courts. These courts have adopted, with some modification, the rules of the civil law, which is more favourable than the common law of England to liberty of choice in marriage. Hence it follows that some restrictions on marriage, which are valid when applied to a gift of real estate, are void when attempted to be imposed on a gift of personal property. The rules respecting real and personal estate so far agree that a condition annexed to a gift of either that a person shall not marry at all is void (*b*). But a gift of either by a husband to his wife during her widowhood is valid (*c*); neither would a gift of the income of property to a single person until marriage, with a gift over on marriage, [*290] *appear to be invalid (*d*). When, however, a gift is made, with a condition that it shall be forfeited if the donee marry without the consent of certain trustees or other persons, the difference between the laws of real and personal estate becomes conspicuous. If the gift be of real estate, or of money charged on real estate, it will cease on the event of marriage without the required consent (*e*). But if it be a bequest of personal property, the condition is regarded as

(*a*) Ante, p. 258.

(*b*) Shep. Touch. 132; Perrin v. Lyon, 9 East, 170, 183; Rishton v. Cobb, 9 Sim. 615; 5 My. & Cr. 145; Morley v. Rennoldson, 2 Hare, 570.

(*c*) Barton v. Barton, 2 Vern. 308.

(*d*) See Right d. Compton v. Compton, 9 East, 267; Morley v. Rennoldson, 2 Hare, 570, 580; Webb v. Grace, 2 Phil. 701; Lloyd v. Lloyd, 2 Sim. N. S. 255.

(*e*) Reynish v. Martin, 3 Atk. 330, 333.

merely *in terrorem* and void (*f*), unless accompanied by a bequest over to some other person on the marriage taking place without consent (*g*); so that the legatee will be entitled to retain the legacy, notwithstanding his or her marriage without consent, unless on that event it be expressly given in some other manner. Such conditions in bequests of personalty when unaccompanied by a gift over are called *in terrorem*, because, says Lord Eldon, "they are supposed to alarm persons, when we know they contain no terror whatsoever (*h*) (1)."

(*f*) *Bellasis v. Ermine*, 1 Cha. Ca. 22.

(*g*) *Stratton v. Grymes*, 2 Vern. 357; *Harvey v. Aston*, 1 Atk. 361; *Clarke v. Parker*, 19 Ves. 1, 13.

(*h*) 19 Ves. 13.

(1) Contracts in restraint of marriage are regarded as contrary not only to the law and order of our nature, but also as contrary to sound policy, and hence are illegal and void. "Marriage, no doubt, may be made the subject of regulation by qualified restrictions, under certain circumstances, but under no circumstances whatever ought a general and entire restriction of it to be countenanced and sanctioned by law * * * Conditions, also, in restraint of marriage, are *odious*; and are, therefore, held to the utmost rigour and strictness. They are contrary to sound policy." *Middleton v. Rice*, 6 Pa. L. Journ. 240. A condition in restraint of marriage is void, therefore, when it is annexed to a legacy without a limitation over; but if there is a limitation over the condition is good; *McIlvaine v. Gethen et als.*, 3 Whart. R. 583; *Hoopes v. Dundas*, 10 Barr's R. 77; *Commonwealth v. Stauffer*, Id. 350; *Middleton v. Rice*, 6 Pa. L. Jour. 230; *Bennett v. Robinson*, 10 Wat. R. 350; *Parsons v. Winslow*, 6 Mass. R. 169; in the last of which cases Judge Sedgwick remarks: "It is a general rule, that a condition annexed to a devise or bequest for life, whereby it is to be divested by the marriage of the devisee or legatee, is to be considered as intended purely *in terrorem*, and it is therefore void. To this rule there is an exception, that such condition shall be effectual, if the subject of the devise or bequest be given over, so as to create an

interest in another person. And again, this exception is restrained and limited. To give it effect, the giving over to a third person must be an *express* giving over of the *particular* devise or legacy, unincorporated with any other subject; and it must also be *immediate*, to take effect at the time of the marriage." But the doctrine just stated will not apply to any case of conditional limitation, for, as was said in *Middleton v. Rice*, "We must be careful not to confound limitations with conditions, for *limitations* may be good, notwithstanding they are seemingly in restraint of marriage, and were so by the civil as well as by the common law. As, for instance, where the meaning of the testator is not to forbid marriage, but to grant the use of the thing bequeathed until the legatee shall marry; or where the prohibition of marriage is not made conditionally by this word, *if* * * * but by other words or adverbs of time; as when the testator willeth that his daughter or wife shall be executrix, or have the use of his goods, *so long* as she shall remain unmarried." And see also, *Coppage v. Alexander's heirs*, 2 B. Mon. R. 314; *Napier v. Davis et al.*, 7 J. Marsh. R. 286; *Hoopes v. Dundas*, 10 Barr's R. 77; *Bennett v. Richardson*, 10 Wat. R. 350.

In the case, however, of a devise of real estate, to cease on the event of a subsequent marriage, it matters not, whether

In order to prevent marriages from being unfairly obtained, it is a rule of equity that all contracts for reward for procuring marriages (called marriage brocage) are void (*i*). And if a parent or guardian should stipulate for any private benefit for the marriage of his child or ward, such stipulation would be void, and money actually paid under it would be decreed to be refunded (*k*).

[*291] *Few marriages are now contracted between persons possessing any amount of property, without a previous settlement of such property being made, in some stipulated manner, for the benefit of the intended husband and wife and the children of the marriage. As marriage is a valuable consideration (*l*), such settlements are

(*i*) Hall v. Potter, 3 Levinz, 411 ; Shower's Par. Cases, 76.

(*k*) 1 Fonblanque on Equity, 262; Smith v. Bruning, 2 Vern. 392.

(*l*) Ante, p. 67.

the gift be coupled with a condition, or a conditional limitation; for in either case it will be good; Phillips v. Medbury, 7 Conn. R. 573; Bailey v. Teackle et als., exec's, Wythe's R. 173; Vance v. Campbell's heirs, 1 Dana's R. 229; Commonwealth v. Stauffer, 10 Barr's R. 350; Bennett v. Robinson, 10 Wat. R. 350; Arnold v. Gilbert, 5 Barb. S. R. 191; and although in Middleton v. Rice, 6 Pa. L. Jour. 230, the learned judge seemed to incline to the opinion, that a devise of real estate upon a condition subsequent in restraint of marriage generally, would be void as to the condition, yet that decision may be considered as overruled by Commonwealth v. Stauffer, and McCullough's Appeal, 2 Jones' R. 197, in which last it was said, "The provision for the wife, in this case, is a devise of the profits, and consequently of the land, to her for life, in the first instance; but coupled with a condition, or a conditional limitation, no matter which, that she do not marry. Whether it be the one or the other, a limitation over is unnecessary to give it effect; for it is a familiar principle, that devises of land, whether to a widow or any one else, are governed, not by the civil, but by the common law, which knows nothing of

a condition *in terrorem*. In the recent case, however, of Williams et al. v. Cowden, 13 Misso. R. 211, where A., by his will devised to his son B. and to his daughter C. in equal moieties a tract of land, with the provision, that "if his said daughter should marry or die," the land should belong exclusively to his said son, it was held, that the above condition attached to the estate of the daughter, is in restraint of marriage, and is void.

"A condition annexed to the vesting of a legacy requiring the guardian's approbation of the legatees marriage, is not *in terrorem* only, when the condition is confined to marriage under twenty-one, and there is a limitation over." Collier, exec., v. Slaughter's adm'r, 20 Ala. R. 263.

For further instances of gifts or devises during widowhood, see, Drury et al. v. Negro Grace, 2 Har. & Johns. R. 356; Crosby v. Wendell et als., 6 Paige's C. R. 548; Picot v. Armistead, 2 Ired. C. R. 226; Bankhead, adm'r, v. Carlisle, adm'r, 1 Hill's C. R. 358; Williams v. Vancleave, 7 Mon. R. 388; Dandridge et al. v. Dorrington, 6 Call's R. 351; Blunt et al. v. Gee et al., Id. 481.

binding on both parties, if of full age. But if either husband or wife should be under age, the settlement will not be binding on him or her (*m*), although the other party, if of full age, will be bound by it (*n*). And if both of them should be under age neither of them will be bound by it. The circumstance of the settlement of an infant's personal property being fair and reasonable, and made with the approbation of his or her guardians, was formerly considered as giving it validity (*o*); but this circumstance seems now to have no weight. It has, however, been decided that a competent legal jointure (*p*) settled on the intended wife, then an infant, with the concurrence of her guardians, in lieu of her right to dower out of her husband's freehold lands, and in lieu of her distributive share of his personal estate in the event of his intestacy, was sufficient to deprive her both of her dower and of her distributive share in her husband's personalty (*q*). When the intended wife only is an infant, a settlement of her personal estate in possession is valid, on account of the interest which, as we shall see, the law gives to the husband in such personal estate. The settlement in such a case is in fact not made by the wife, but by the husband, who, being adult, is bound by its provisions *to the extent of the interest which he would have taken had no settle- [*292] ment been made (*r*).

If no settlement be made, the principles which govern the rights of husband and wife to personal property must still be traced to the circumstances of ancient rather than of modern times. In ancient times landed property was by far the most important; and the wife was accordingly entitled to a provision out of the lands of her husband, in the event of her surviving him, which no alienation that he could make, nor any debts which he might incur, were able to set aside (*s*). But in those days personal property was of too insignificant a value to be the subject of any such provision. And if a woman now marry without a settlement, she has still no claim on her husband's personal

(*m*) *Ellison v. Elwin*, 13 Sim. 309; *Le Vasseur v. Scrutton*, 14 Sim. 116.

(*n*) *Durnford v. Lane*, 1 Bro. C. C. 106; *Milner v. Lord Harewood*, 18 Ves. 299.

(*o*) 2 *Roper's Husband and Wife*, 26.

(*p*) See *Principles of the Law of Real Property*, 174, 1st ed.; 184, 2d ed.; 191, 3d ed.

(*q*) *Earl of Buckingham v. Drury*, 3 Brown's Par. Cas. 492.

(*r*) *Trollope v. Linton*, 1 Sim. & Stu. 477, 485.

(*s*) See *Principles of the Law of Real Property*, 172, 1st ed.; 182, 2d ed.; 189, 3d ed.

estate, however large, unless he should happen to die intestate, in which case, as we have already mentioned, she is entitled to a third or a half of what he may leave, according as he may or may not leave issue surviving him. A husband, on the other hand, was in ancient times considered absolutely entitled to such personal chattels as his wife might possess. In this respect the law was then both simple and sufficient. By the act of marriage, the wife placed herself under the coverture or protection of her husband. She became in the law French of those days a *feme covert*. Thenceforth all demands to which she was personally liable were to be answered by her natural protector. The wife was considered as merged in her husband, and both were regarded as but one person (*t*). So long therefore as the coverture continued, that is, during the joint lives of the husband and wife, the husband was absolutely entitled to all personal property [*293] which his wife might *acquire, and was also liable to the payment of all debts which she might previously have incurred (1). These simple principles still pervade the law relating to the husband's interest in his wife's person estate, although the several different species of personal estate to which modern civilization has given rise, conjoined with the rules of equitable administration laid down by the Court of Chancery, have given to this branch of law a perplexity unknown to the simple, though somewhat harsh, rules of our ancestors.

In the first place, then, personal property of the ancient kind, namely, chattels personal or moveable goods, belonging to the wife at the time of her marriage, or given to her afterwards, become the absolute property of her husband, in the same manner precisely as if they had been originally his own, or had been subsequently given to him (*u*).

(*t*) Ibid. 164, 1st ed.; 176, 2d ed.; 183, 3d ed.

(*u*) Co. Litt. 300 a; 351 b; Bac. Abr. tit. Baron and Feme, (C) 3; 1 Rep. Husb. and Wife, 169.

(1) For the statutes of the several States Dela., Revis. Code, (1852,) p. 236; Purd. on this subject, see Stats. of O., (1841,) Dig., (1853,) pp. 220, 221, 251, 451, 568, pp. 265, 266, 290, 296, 575, 576; Revis. 699; An Act of the legislature of California, defining the rights of husband and wife, approved April 17, 1850; and see Missi. p. 327; N. H. Compil. Stats., (1853,) generally, the titles Husband and Wife, p. 379; Dallam's Dig. of the Ls. of Tex., Abatement, Alimony, Conveyance, Curtesy, Divorce, Dower, Feme-Covert, Jointure, Marriage, Married Women, Widow, (3d. ed.,) p. 199; Revis. Stats. of N. Y., (1839,) p. 327; Michi. Revis. Stats. p. &c. &c., as contained in the respective 332; Revis. Stats. of Maine, p. 358; Ls. of Digests of Statutes.

He may dispose of them as he pleases in his lifetime or by his will; they will be subject to his debts; and if he should die intestate, the wife will have no further claim to them than to any other of his effects.

The only exceptions to this sweeping rule are the wife's *paraphernalia*, so called from the Greek *παραφερνή*, being things to which the wife is entitled over and above her dower. The wife's paraphernalia consists of her apparel and ornaments suitable to her rank and degree (*x*); and gifts made by the husband to his wife of jewels or trinkets to be worn by her as ornaments are considered as part of her paraphernalia (*y*). These articles, equally with the wife's other personal chattels, may be disposed *of by the husband in his lifetime (*z*), [*294] and, with the exception of the wife's necessary clothing, are also liable to his debts (*a*). The wife also herself has no power to dispose of them by gift or will during her husband's lifetime (*b*). But paraphernalia differ from the wife's other personal chattels in this respect, that the husband, though he may dispose of them in his lifetime, has no power to bequeath them away from his wife by his will (*c*). Gifts of jewels or trinkets made to the wife by a relative or friend, either upon or after her marriage, will generally be considered in equity as intended for her *separate use* (*d*), in which case they will not be reckoned amongst her paraphernalia, but will, as we shall hereafter see, be exempt from the control and debts of her husband, and may be disposed of by the wife in the same manner as if she were unmarried.

With regard to such of the wife's personal estate as is not in possession, but for which she has only a right to sue, the rights of the husband are different, according as the proceedings against the persons liable to be sued must be taken in a court of law or of equity. Property of this nature, as we have already seen (*e*), is termed in law

(*x*) 2 Bl. Com. 436; 2 Rep. Husb. and Wife, 140; 11 Vin. Abr. tit. Executors (Z. 5.)

(*y*) *Graham v. Londonderry*, 3 Atk. 394.

(*z*) *Ibid.*; 2 Rep. Husb. and Wife, 141.

(*a*) 2 Bl. Com. 436; *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Lord Townshend v. Windham*, 2 Ves. sen. 1, 7.

(*b*) 2 Rep. Husb. and Wife, 141.

(*c*) *Tipping v. Tipping*, 1 P. Wms. 730; *Northey v. Northey*, 2 Atk. 77.

(*d*) *Graham v. Londonderry*, 3 Atk. 394; 2 Rep. Husb. and Wife, 143.

(*e*) *Ante*, p. 4.

French *choses in action*: such as may be recovered by action at law are called legal choses in action, and such as must be recovered by suit in equity are called equitable choses in action. With regard to each of them, the rights of the husband are of a different kind, although in each the same rule applies, that if he can get them into [*295] his possession during the coverture he *has a right to keep them, otherwise they will still belong to his wife (*f*).

Legal choses in action consist principally of debts due to the wife, and secured or not by bond, or by bills or promissory notes. Of all these the husband has a right to receive payment, and should payment be refused him, he may sue for them in the joint names of himself and his wife (*g*); but bills and notes of the wife payable to order, being transferable by indorsement, may be indorsed by the husband alone (*h*), or sued for in his own name (*i*). All such legal choses in action as accrued to the wife *after* her marriage, may be sued for by the husband, either in the joint names of himself and his wife, or in his own name only (*k*); but if the wife has really no interest, he cannot of course make use of her name (*l*). If the husband should sue in the joint names of himself and his wife, the benefit of the judgment of the court will in case of his decease survive to her (*m*); but if he sue in his own name, the benefit of the judgment will form part of his own personalty. If however the husband should not have received the money in his lifetime, or should not have obtained judgment for it in his own name, his wife will, on his decease, be entitled by survivorship to the chose in action so remaining still unreduced into pos- [*296] session (*n*); and *bills and notes form no exception to this rule (*o*). But, if the wife should die before her husband, these choses in action, still remaining unreduced, will form part of her personal estate; and her husband must take out administration to her

(*f*) 2 Bl. Com. 434; 1 Wms. on Executors, pt. 2, bk. 3, ch. 1, s. 3.

(*g*) 1 Rop. Husb. and Wife, 213, 214; Sherrington v. Yates, 12 Mee. & Wels. 855.*
In this case the note was not payable to order, and therefore not negotiable.

(*h*) Mason v. Morgan, 2 Ad. & El. 30.*

(*i*) Burrough v. Moss, 10 Barn. & Cress. 558.*

(*k*) 1 Rop. Husb. and Wife, 213.

(*l*) Abbot v. Blofield, Cro. Jac. 644.

(*m*) 1 Vern. 396; 1 Rop. Husb. and Wife, 212.

(*n*) Co. Litt. 351 b.

(*o*) Richards v. Richards, 2 Barn. & Adol. 447; * Gaters v. Madeley, 6 Mee. & Wels.* 423; Hart v. Stephens, 6 Q. B.* 937; Scarpellini v. Atcheson, 7 Q. B. 864.*

effects before he can proceed to recover them (*p*): when recovered, they will, with the rest of her personalty, belong to himself absolutely, after payment of his debts (*q*). The only exception to this rule occurs in the case of the husband being entitled, in right of his wife, to "any estate in fee simple, fee tail, or for term of life, of or in any rents or fee-farms," in which case the husband after the death of his wife, is empowered by statute (*r*) to recover the arrears accrued to his wife before marriage, by action of debt or distress. But this provision does not apply to the rents reserved upon leases for years (*s*).

Equitable choses in action consist principally of legacies, residuary personal estate of testators, and money in the funds. But all kinds of property, including, as is now decided, both freehold estates (*t*) and chattels real (*u*), vested in trustees who are answerable only to the Court of Chancery, are subject to a rule of equity, by which equitable choses in action are mainly distinguished from such as are merely legal. This rule is as follows: that the Court of Chancery will not assist, nor, if the wife should dissent, will it allow, the husband to *recover [*297] or receive any property of his wife recoverable only in that court, without his settling a due proportion of such property on his wife and children (*x*). The right of the wife to such a provision is termed *the wife's equity for a settlement* (*y*). It was formerly considered that this equity did not always attach to property in which the wife had only a life interest (*z*); but this doctrine appears to be now overruled (*a*). In fixing the proportion to be settled, a prior settlement will always be taken into account (*b*). But where no settlement has previously been made, the proportion required to be settled on the wife is most frequently one-half (*c*); and sometimes the court has gone so

(*p*) 1 Rop. Husb. and Wife, 205; see *Betts v. Kimpton*, 2 B. & Adol. 273.

(*q*) Stat. 29 Car. II. c. 3, s. 25, ante, p. 281.

(*r*) Stat. 32 Hen. VIII. c. 37, s. 3.

(*s*) *Prescott v. Boucher*, 3 Barn. & Adol. 849.*

(*t*) *Sturgis v. Champneys*, 5 Myl. & Cr. 97. See, however, *Sugd. Concise Vendors*, 418.

(*u*) *Hanson v. Keating*, 4 Hare, 1.

(*z*) It was formerly held that the wife's equity to a settlement did not extend to sums under 200*l.*; *Foden v. Finney*, 4 Russ. 428; but this distinction is now abolished. In *re Cutler*, 14 Beav. 220.

(*y*) 1 Rop. Husb. and Wife, 256 et seq.

(*z*) *Elliott v. Cordell*, 5 Mad. 149; *Stanton v. Hall*, 2 Russ. & M. 175, 182.

(*a*) *Wilkinson v. Charlesworth*, 10 Beav. 324, 328.

(*b*) *March v. Head*, 3 Atk. 720; *Lady Elibank v. Montolieu*, 5 Ves. 737.

(*c*) 1 Rop. Husb. and Wife, 260; *Archer v. Gardiner*, 1 C. P. Coop. 340.

far as to require a settlement of the whole fund (*d*). Although the children are usually inserted in the settlements, yet the right is personal to the wife, and may be waived by her (*e*); nor will it survive to the children in case of her decease before the court has made its decree (*f*); but if she die after the decree, it will still be carried into effect for the benefit of the children (*g*). This rule of the Court of [298] Chancery is *founded on one of the maxims of equity, that he who would have equity must do what is equitable (*h*); it cannot, therefore, be enforced until the time arrives when the fund becomes payable to the husband (*i*). If, however, as most frequently happens, the husband can obtain from the executor or trustee of the fund in question payment of it to himself, without the assistance of the court, he has a right to do so, and in this case the wife's equity is at once excluded; and if the time of payment has arrived, the executor or trustee may safely pay over the fund to the husband, unless the wife should have already filed her bill in Chancery to enforce her right to a settlement (*k*); and the receipt of the fund by the husband, when it has thus become payable, is also an effectual bar to the wife's right by survivorship (*l*).

If the husband, instead of obtaining payment of the fund, should assign it to a third person (*m*), or if he should become bankrupt or insolvent (*n*), his assignee will take subject to the wife's equity for a settlement, in the same manner as if no assignment had been made. And if the husband should die before the assignee has got possession of the fund, leaving his wife surviving, the wife's right by survivorship

(*d*) Brett v. Greenwell, 3 You. & Coll. 230; Gardner v. Marshall, 14 Sim. 575; Scott v. Spashett, 3 Mac. & Gord. 599; Dunkley v. Dunkley, L. C. 16 Jur. 767.

(*e*) Murray v. Lord Elibank, 13 Ves. 6. But the wife having once insisted on her right cannot afterwards waive it; Barker v. Lea, 6 Mad. 330; Whitem v. Sawyer, 1 Beav. 593.

(*f*) De la Garde v. Lempriere, 6 Beav. 344, overruling Steinmitz v. Halthin, 1 Glyn & Jam. 64; Baker v. Bayldon, 8 Hare, 210.

(*g*) Groves v. Clarke, 1 Keen, 132; S. C. Groves v. Perkins, 6 Sim. 584.

(*h*) 2 P. Wms. 641.

(*i*) Osborn v. Morgan, 9 Hare, 432.

(*k*) 1 Rep. Husb. and Wife, 273; Murray v. Lord Elibank, 10 Ves. 90.

(*l*) 1 Rep. Husb. and Wife, 220; Rees v. Keith, 11 Sim. 383; Cunningham v. Antrobus, 16 Sim. 436.

(*m*) 1 Rep. Husb. and Wife, 271; Malcolm v. Charlesworth, 1 Keen, 73, 74; Scott v. Spashett, 3 Mac. & Gord. 599; Carter v. Taggart, 5 De Gex & Smal. 49.

(*n*) 1 Rep. Husb. and Wife, 268.

will prevail over the title of the assignees, whether in bankruptcy or insolvency (*o*), or for valuable consideration (*p*.)

*If the wife should be entitled to any chose in action, [*299] whether legal or equitable, of a reversionary nature, that is, not immediately recoverable, the effect of an assignment by the husband will be different under different circumstances. The wife, of course, cannot assign; for by the act of marriage she deprives herself of all power so to do; and the husband can only assign to another the interest to which he may be entitled himself. Suppose therefore that the wife is entitled, on the death of A., a person now living, to a sum of stock standing in the names of trustees, and that her husband should make an assignment of this reversionary interest to B., a purchaser. The benefit which will accrue to B. by virtue of this assignment will vary according as the husband, the wife, or A., the tenant for life, may happen to die first. If the husband should die first, B. will lose his purchase; for the wife, having survived her husband, will now on the death of A. be entitled to the stock, which has never been reduced into the possession of her husband, or of B., his assignee (*q*). If A. should die first, B. may then obtain a transfer of the stock, if the trustees choose to transfer it to him, and if the wife should not have filed a bill to enforce her equity to a settlement (*r*). But if the trustees should refuse to transfer without the direction of the Court of Chancery, or if the wife should insist upon her right, then B. will, as we have seen (*s*), most probably obtain only half of the fund for his own benefit, and will be obliged to settle the other half on the wife and children. If, however, the wife should die first, then this chose in action remaining unreduced into possession, will, like a legal chose in action under the same circumstances (*t*), remain part of the wife's personal estate; and the husband, on taking out *administration [*300] to his wife, will be bound by his previous assignment. B. will accordingly in this single event obtain the whole fund, subject however to the wife's debts, if any. It was once thought that if an assignment could be obtained from the tenant for life, of his life interest in a fund circumstanced as above mentioned, to the married

(*o*) *Pierce v. Thornley*, 2 Sim. 167.

(*p*) *Hutchings v. Smith*, 9 Sim. 137; *Ellison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Coll. 553; *Le Vasseur v. Scrutton*, 14 Sim. 116.

(*q*) *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65.

(*r*) *Greedy v. Lavender*, 13 Beav. 62.

(*s*) *Ante*, p. 297. (*t*) *Ante*, p. 296.

woman entitled to the reversion, she would be in the same situation as if the whole fund had been originally held in trust for her absolutely; and that after such an assignment, the whole fund might therefore be transferred to the husband (*u*). But it is contrary to the general principles of equity to allow the rights of parties to be affected by any merger or extinguishment of interests; and the doctrine in question has been overruled (*x*).

The same principles which apply to the assignment by a husband of his wife's reversionary interest in a chose in action, apply also to his release, which will be as little binding on her as his assignment, in case of her being the survivor (*y*). If, however, the reversionary chose in action of the wife consist of money charged on real estate, it was the general opinion that the wife's interest could either be released or assigned by a deed acknowledged by her, with the concurrence of her husband, under the provisions of the act for the abolition of fines and recoveries (*z*). The contrary, however, has been decided in a recent case (*a*).

The same principle of the merger of the wife in the husband, which [*301] gives him such important rights in her *personal estate, renders him also answerable for all the debts and liabilities of his wife contracted previously to her marriage (*b*). But if judgment for any debt be not recovered during the continuance of the marriage, the liability ceases, except to the extent of the assets to which the husband may be entitled as his wife's administrator (*c*); and if the wife survive, she will again become solely liable. The husband is also bound during the coverture to supply his wife with necessaries suitable to her station in life. She is therefore, whilst living with him, considered as his agent for the purchase of any such necessary articles with which he may not have supplied her (*d*). And even if the articles

(*u*) *Creed v. Perry*, 14 Sim. 592; *Hall v. Hugonin*, 14 Sim. 595; *Bishopp v. Colebrook*, V. C. E. 11 Jur. 793.

(*x*) *Whittle v. Henning*, 11 Beav. 222; affirmed, 2 Phil. 731.

(*y*) *Rogers v. Acaster*, 14 Beav. 445.

(*z*) Stat. 3 & 4 Wm. IV. c. 74; see *Principles of the Law of Real Property*, 171, 1st ed.; 181, 2d ed.; 188; 3d ed.

(*a*) *Hobby v. Allen*, V. C. Knight Bruce, 15 Jur. 835.

(*b*) 2 *Roper's Husband and Wife*, 73; *Palmer v. Wakefield*, 3 Beav. 227.

(*c*) *Heard v. Stamford*, 3 P. Wms. 409.

(*d*) 2 *Roper's Husband and Wife*, 110; *Seaton v. Benedict*, 5 Bing. 28.*

should not be necessities, yet if the husband be aware of the purchase (*e*), or if he recognize it, by allowing his wife to use or wear the articles bought (*f*), she will be considered as having bought them with his authority, and he will consequently be liable to pay for them.

The burdens with which the husband is thus chargeable are the consideration which he pays for his marital rights in his wife's property. It is therefore a rule of law, that the husband shall not, previously to the marriage, be defrauded of those rights by his intended wife (*g*). Accordingly if the wife, after an engagement to marry, should assign away any of her property, without the knowledge and consent of her intended husband, such assignment would be void, as a fraud on his marital rights (*h*). And the circumstance of the intended husband's* being ignorant of her possession of the property in [*302] question would be immaterial (*i*).

The right of the husband to the whole of his wife's personal estate, in the event of her decease in his lifetime, may be waived by his giving her authority to dispose of such estate, or any part of it, by her will; and such a will will be valid and binding on the husband if he once allow it to be proved (*k*). But during the wife's lifetime, and even after her death, until probate of the will, this authority may be revoked; and if the husband should die before the wife, such a will would not be binding on the wife's next of kin (*l*).

But at the present day, power to dispose of property of any kind may be given to a married woman, independently of her husband, by means of a trust for her *separate use* which trust will be enforced in equity (*m*). When personal estate is so given, the wife has the same powers of ownership as if she were a feme sole; she may accordingly dispose of such property without her husband's concurrence, either in her lifetime or by her will (*n*). But should she die in his lifetime.

(*e*) *Petty v. Anderson*, 3 Bing. 170.*

(*f*) See *Montague v. Benedict*, 3 Barn. & Cress. 681, 688.*

(*g*) *Countess of Strathmore v. Bowes*, 1 Ves. jun. 22, 28.

(*h*) *England v. Downs*, 2 Beav. 522; *Taylor v. Pugh*, 1 Hare, 608.

(*i*) *Goddard v. Snow*, 1 Russ. 485.

(*k*) 1 *Rep. Husb. and Wife*, 169, 170. (*l*) 15 Ves. 156.

(*m*) See *Principles of the Law of Real Property*, 164, 1st ed.; 174, 2d ed.; 181 3d ed.

(*n*) *Fettilplace v. Gorges*, 1 Ves. jun. 46; S. C. 3 Bro. C. C. 8; 2 *Rep. Husb. and Wife*, 182.

without having made any disposition, her husband will become entitled to it either in his marital right (*o*) or as her administrator (*p*), according as the property may be in possession or in action. A trust for a woman's *separate use* is properly and technically created by means of [*303] the *words "separate use." But a gift to a woman for her sole use (*q*), or a direction that her receipt alone shall be a sufficient discharge (*r*), will also create a trust for her separate use. A gift however, to a woman for her own use (*s*), or to be paid into her proper hands (*t*), or even to be paid into her proper hands for her own proper use and benefit (*u*), will not be sufficient to exclude the rights of her husband.

A simple gift of property for a married woman's separate use is not so usual as the gift of the income only of the property during her life or during the joint lives of herself and her husband (*x*). A gift of the income of property to a woman's separate use may be made either after her marriage, or in contemplation of marriage, or whilst she is sole; and the gift may be made either independently of her present husband, if any, or of any future husband. When the gift is made to a woman's separate use, independently of any future husband, the act of her marriage will confer no interest in the property on her husband, but she will enjoy after marriage, the same interest and power of disposition as she had before (*y*). It is, however, more usual, when the income only of property is given to a wife's separate use, to insert a condition that she shall not dispose of the same in any mode of anticipation. Conditions restraining the alienation of property are generally invalid, as being contrary to the policy of the law. But the courts of equity have made an exception to this rule in favour of married [*304] *women, and having once established a trust for a woman's separate use, they have permitted such a trust to be made effectual by depriving the wife herself of the power of disposition (*z*).

(*o*) *Molony v. Kennedy*, 10 Sim. 254; *Tugman v. Hopkins*, 4 Man. & Gran. 384.*

(*p*) *Watt v. Watt*, 3 Ves. 246, 247; *Proudley v. Fielder*, 2 My. & Keen, 57.

(*q*) — *v. Lyne, Younge*, 562.

(*r*) *Lee v. Prieaux*, 3 Bro. C. C. 381.

(*s*) *Roberts v. Spicer*, 5 Madd. 491; *Kensington v. Dollond*, 2 Myl. & Keen, 184.

(*t*) *Tyler v. Lake*, 2 Russ. & Myl. 183.

(*u*) *Blacklow v. Laws*, 2 Hare, 49.

(*x*) See Appendix B.

(*y*) *Tullett v. Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 34; 4 Myl. & Cr. 377.

(*z*) *Brandon v. Robinson*, 18 Ves. 434.

When the income of property is given to a woman's separate use, without power of anticipation, she is not thereby deprived of the power of alienation so long as she continues single (*a*). Previously to or in contemplation of marriage she may therefore make such disposition or settlement of such income as she may think proper. But should she marry without a settlement, the restraint on alienation will then attach, and so long as she remains under coverture she will have no further power than that of receiving the income as it grows due (*b*). On her widowhood her power of alienation will again revive (*c*), but will cease on her second marriage without having previously made any disposition (*d*), provided the restriction on alienation be not, by the terms of the gift, confined to her first marriage (*e*). The intention to restrain alienation ought always to be clearly expressed. A direction to pay the income of property into the hands of a married woman, and not otherwise (*f*), or on her personal appearance and receipt (*g*), will not be sufficient to restrain her from disposing of her interest, the words being considered as intended only to exclude the marital claims of her husband. But if an intention can be collected from the terms of the instrument, not only to exclude the husband's* claims, but also to prevent the wife from anticipating, such intention will [*305] prevail, although it may be expressed rather in popular than in strictly technical language (*h*).

In addition to trusts for separate use, powers of appointment may as we have seen (*i*), be given to married women independently of their husbands, by means of which they may be enabled to dispose of property without their husbands' concurrence (*k*); and any appointment under a general power may be made by a married woman in favor of her husband, as well as of any other person (1).

(*a*) *Woodmeston v. Walker*, 2 Russ. & Myl. 197; *Brown v. Pocock*, 2 Russ. & Myl. 210.

(*b*) *Tullet v. Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 34; 4 Myl. & Cr. 377.

(*c*) *Barton v. Briscoe*, Jacob, 603.

(*d*) *Tullet v. Armstrong*, ubi supra.

(*e*) *Re Gaffee*, 1 Mac. & Gord. 541.

(*f*) *Acton v. White*, 1 Sim. & Stu. 429.

(*g*) *Ross's Trust*, 1 Sim. N. S. 196.

(*h*) *Brown v. Bamford*, 1 Phil. 620; *Moore v. Moore*, 1 Coll. 54; *Harrop v. Howard*, 3 Hare, 624; *Harnett v. Macdougall*, 8 Beav. 187; *Field v. Evans*, 15 Sim. 375.

(*i*) *Ante*, p. 209.

(*k*) See Appendix B.

(1) A married woman having a power of may dispose of it without the consent of appointment over real or personal estate, her husband; *Osgood v. Breed*, 12 Mass. R.

Unhappy differences between husband and wife sometimes end in a separation. Such a state of things is not however, encouraged by the

532; *Hoover v. The Samaritan Society*, 4 Whart. R. 453; *Towers v. Hagner* 3 Id. 48; *Holman v. Perry et al.*, 4 Metc. R. 496; *Bradish v. Gibbs et als.*, 3 Johns. C. R. 536; *Newlin v. Freeman et al.*, 1 Ired. R. 514; *West v. West et al.*, 10 Serg. & Raw. R. 149; *Barnes' Lessee v. Irwin et al.*, 2 Dal. R. 201; *Leigh, adm'r, v. Smith et al.*, 3 Ired. C. R. 442; *Wilkinson v. Wright, &c.*, 6 B. Mon. R. 577; *Strong v. Wilkin et als.*, 1 Barb. C. R. 1; *Moerhing v. Mitchell, &c.*, Id. 264; *Robbins v. Abrahams et al.*, 1 Halst. C. R. 465; *Cruger v. Cruger*, 5 Barb. S. R. 226; *S. C. nomine Cruger v. Douglass*, 4 Edw. C. R. 433; *Ladd v. Ladd et als.*, 8 How. R. 10; *Pollock v. Glassell*, 2 Gratt. R. 439; *Woodson v. Perkins*, 5 Id. 351; *Hicks, exec. v. Cochran et als., exec's*, 4 Edw. C. R. 107; *Am. Home Missionary Society v. Wadhams*, 10 Barb. S. R. 604; *Chapman v. Gray, exec.*, 8 Geo. R. 341; *Barton et al. v. Holly*, 18 Ala. R. 408; *Petty v. Mallier*, 14 B. Mon. R. 246; In the case of *Thompson v. Murray*, 2 Hill's C. R. 214, it was said by O'Neill, J.: "Notwithstanding in general legal contemplation, the existence of the wife is merged in that of her husband during coverture, yet this rule is not of such universal application as to render every act of the wife void. * * * A feme covert may execute any kind of power, whether simply collateral, appendant or in gross, and it is immaterial whether it was given to her while sole or married. The concurrence of the husband is in no case necessary. * * *

It may be well, however, to look at the manner in which an appointment operates, to show that no objection can in fact exist to an execution of it by a feme covert. The appointee is merely designated by the person making the appointment; his estate and rights are derived from the deed creating the power. * * * This being the case, and the appointee taking nothing from the wife, but all from the person creating the power, there can be no reason to avoid her act on account of coverture, the disability of which is intended both for the protection of her husband and also for herself." Such powers will be good, though created by articles of agreement, made between husband and wife before coverture without the intervention of a trustee, for "it is now no longer deemed necessary that the legal estate should be vested in trustees, to enable a feme covert to dispose of her estate in equity. A mere agreement, entered into before marriage with her husband, that she should have the power to dispose of her real and personal estate during coverture, will enable her to do so. Although such an agreement becomes extinguished, at law, by the subsequent marriage, yet equity supports it, and will compel the husband to perform it;" *Strong v. Skinner*, 4 Barb. S. R. 552; *Emery, adm'r, v. Neighbour et al.*, 2 Halst. R. 142; *Bradish v. Gibbs et als.*, 3 Johns. C. R. 536; *Newlin v. Freeman et al.*, 1 Ired. R. 514; *Barnes' lessee v. Irwin et al.*, 2 Dal. R. 201, and the cases referred to in the note to page 228, ante. And a feme covert may execute these appointments as well in favour of her husband as a stranger; *Hoover v. The Samaritan Soc.*, 4 Whart. R. 453; *Towers v. Hagner*, 3 Id. 48; *Bradish v. Gibbs*, 3 Johns. C. R. 536; *Dallam v. Wampole et al.*, Pet. C. C. R. 116; *Jaques et al. v. The Trustees of the M. E. Church*, 17 Johns. R. 548; *Whitall v. Clark et al.*, 2 Edw. C. R. 149; *Cruger v. Cruger*, 5 Barb. S. R. 226, *S. C. nomine Cruger v. Douglas et als.*, 4 Edw. C. R. 433; *Gardner v. Gardner et als.*, 22 Wend. R. 526; *Meriam v. Harsen et al.*, 4 Edw. C. R. 70; *Imlay et als. v. Huntington et als.*, 20 Conn. R. 173. As regards the formalities required to be observed in the execution of these powers, see *Jackson v. Edwards*, 7 Paige's C. R. 402; *Picquet v. Swan et al.*, 4 Mas. R. 461; *Emery, adm'r,*

law. A clause in a marriage settlement providing for the event of a separation, has been considered to be void (1); and so has a condition

(1) Cocksedge v. Cocksedge, 14 Sim. 244; see also, Hindley v. Marquis of Westmeath, 6 Barn. & Cres. 200.*

v. Neighbour et al., 2 Halst. R. 142; Newlin v. Freeman et al., 1 Ired. R. 514; Leigh, adm'r, v. Smith et al., 3 Ired. C. R. 442; Heath v. Withington, 6 Cush. R. 497.

It has been repeatedly decided, that a *feme covert* is, in respect to her separate estate, to be deemed a *feme sole*; Leaycraft v. Hedden, 3 Green's C. R. 512; N. A. Coal Co. v. Dyott, 7 Paige's C. R. 1, S. C. 20 Wend. R. 570; Virouneau v. Pegram, 2 Leigh's R. 183; Williamson v. Beckham, 8 Id. 20; Cumming et al. v. Williamson et als., 1 Sandf. C. R. 17; Martin v. Dwelly et als., 6 Wend. R. 1; McCroan et als. v. Pope et als., 17 Ala. R. 612; but, there is considerable variance among the decisions, as to the extent of her ability to dispose of her estate under a power, some holding that she may grant or devise in any manner not expressly negatived in the instrument creating the power; and others maintaining that she can only exercise those powers expressly given and in the manner pointed out, and not otherwise. The weight of authority is decidedly in favour of the latter doctrine; thus, in Pennsylvania, although in the case of Newlin et al. exec's, v. Newlin, 1 Serg. & Raw. R. 274, it was held, "that if a man devise his real estate to trustees to raise a sum of money, which when raised, they are to put out at interest, for the sole and separate use of his daughter, a *feme covert*, who is to receive the interest annually, and whose receipt is to be a discharge, she may release her interest, though no express power of appointment be given in the will;" yet, that decision has been overruled, and there is no question that it is now the law of that State, "that instead of having every power from which she is not negatively debarred in the conveyance, she will be deemed to have none but what

is positively given or reserved to her;" Thomas v. Folwell et al., 2 Whart. R. 11; Lancaster v. Dolan, 1 Raw. R. 231; Rogers v. Smith, 4 Barr's R. 93; Lyne's exec. v. Crouse et al., 1 Id. 114; Dorrance v. Scott, 3 Whart. R. 316; Wallace v. Coston, 9 Wat. R. 137; Estate of Wagner, 2 Ash. R. 448. The law of Tennessee, Virginia, South Carolina, Alabama, Georgia and Maryland, is similar to that of Pennsylvania, as will be seen from the following cases, which agree in principle with the Pennsylvania decisions; Morgan v. Elam et als., 4 Yerg. R. 375; Litton v. Baldwin et als., 8 Humph. R. 209; Ware et al. v. Sharp, 1 Swan's R. 489; Ellis et als. v. Barker, exec., 1 Rand. R. 47; Calhoun v. Calhoun et al., 2 Strobb. E. R. 231; Ewing et al. v. Smith et al., 3 Desauss. R. 456; Reid v. Lamar, 1 Strobb. E. R. 27; Maywood et al. v. Johnston et als., 1 Hill's C. R. 230; Clark v. Makenna, Cheeves' E. R. 163; Doty et al. v. Mitchell, 9 Smed. & Mar. R. 435; Montgomery et al. v. The Agricultural Bank, 10 Id. 566; Wyly at als. v. Collins & Co., 9 Geo. R. 237; Weeks v. Sego, adm'r, 9 Id. 199; Tarr et als. v. Williams, 4 Md. C. Decs. 68; Williams v. Donaldson et al., Id. 414; Miller et al. v. Williamson et al., 5 Md. R. 220. In the State of New York, so long ago as the case of The Trustees of the M. E. Church v. Jaques et als., 3 Johns. C. R. 77, it was decided by Chancellor Kent, that a "*feme covert*, with respect to her separate property, is to be considered as a *feme sole*, to the extent only of the power given to her by the marriage settlement. Her power of disposition is not absolute, but *sub modo*, to be exercised according to the mode prescribed in the deed or will under which she becomes entitled to the property. Therefore, if she has a power of

in a gift of personal estate to a woman living apart from her husband, that the gift shall cease in case she should cohabit with him (*m*). It

(*m*) *Wren v. Bradley*, 2 De Gex & S. 49.

appointment by *will*, she cannot appoint by *deed*, or where she is empowered to appoint by *deed*, the giving a bond, or note, or a parol promise, without reference to the property, or making a parol gift of it, is not such an appointment." But that decision was reversed in *Jaques et al. v. The Trustees of the M. E. Church*, 17 Johns. R. 548, where it was held, that "though a particular mode of disposition be specifically pointed out in the instrument, or deed of settlement, it will not preclude her adopting any other mode of disposition, unless there are *negative* words restraining her power of disposition, except in the very mode so pointed out;" and this still continues to be the law of that State; *The Firemen's Insurance Co. of Albany v. Bay*, 4 Barb. S. R. 413, S. C. 4 Comst. R. 9; *Knowles et al. v. McCamly et als.*, 10 Paige's R. 342; *Strong v. Skinner*, 4 Barb. S. R. 552; *Gardner v. Gardner et als.*, 22 Wend. R. 526; although the doctrine has been somewhat modified by the enactment of the Revised Statutes, since which, "where real estate is settled to a married woman's separate use, neither the estate nor the rents and profits, can be charged for any debt or liability created, or imposed upon it by her. It is no longer *her estate*. The whole estate is in the trustees, and her interest inalienable;" *Noyes v. Blakeman*, 3 Sandf. S. R. 531; *L'Amoreaux v. Van Rensselaer et als.*, 1 Barb. C. R. 34; *Rogers v. Ludlow et al.*, 3 Sandf. C. R. 104. In Connecticut, it was said by Storrs, J., in the case of *Imlay et als. v. Huntington et als.*, 20 Conn. R. 173, "The principle is established, by the decided weight of authorities, in this country, in accordance with what is now universally conceded to be the established doctrine in England, that an anti-nuptial settlement, by a woman, of her property, to her separate use after marriage, gives her, in

equity, the full power of disposing of such property, by any suitable act or mode of conveyance, in the same manner, and to the same extent, as if she were a feme sole, excepting so far as there is some express or implied restriction upon such power of disposition in the instrument of settlement; and that no such restriction is implied from the circumstance that it is provided, in such settlement, that she may dispose of it in any particular mode therein pointed out; but that such provision must either expressly, or by necessary implication, exclude any other mode of disposition, in order to constitute such a restriction." The same has been held also in North Carolina; *Harris et al. v. Harris et al.*, 7 Ired. E. R. 111.

As to the manner in which a married woman may charge her separate estate for the debts of herself or her husband, see *Conn et al. v. Conn et al.*, 1 Md. C. Decs. 212; *Price et al. v. Bigham's exec's*, 7 H. & Johns. R. 296; *Tiernan v. Poor et al.*, 1 Gill. & Johns. R. 216; *Frazier et al. v. Brownlow et al.*, 3 Ired. E. R. 237; *Boarman v. Groves*, 23 Missi. R. 380; *Cherry v. Clements*, 10 Humph. R. 552; *Greenough v. Wiggington*, 2 Green's R. 435; *Bradford v. Greenway et als.* 17 Ala. R. 797; *Coats et al. v. Robinson et al.*, 10 Missi. R. 760; *Forrest et al. v. Robinson, exec.*, 4 Port. R. 44; *Sadler et al. v. Houston et al.*, Id. 208.

A distinction is to be noted between real and personal property of the wife, as regards the ability of her husband to consent to her making disposal thereof; thus, "A husband may waive the interest which the law gives him in his wife's estate, and empower her to dispose of her personal estate by will; and his assent alone to a bequest by her of money or chattels, will make it valid; but, as to the real estate of the wife, the rule is different; and his

is however clear, that a deed making provision for an immediate separation between husband and wife is not void for illegality (*n*). One of the usual provisions of a deed of separation is, a covenant on the part of some friend of the wife's to indemnify the husband against any debts she may incur whilst living apart. Such a covenant is a valuable consideration for any settlement which the husband may make *for [*306] the benefit of his wife, and places such settlement on the same footing as any other alienation made for valuable consideration (*o*). But if there be no such covenant, nor any other valuable consideration (*p*), a settlement made by a husband on separating from his wife, stands in the same position as any other voluntary deed (*q*); and, though binding on himself, may not be binding on his creditors (*r*). The circumstance of separation gives to the wife no further power of disposition over property than she possessed whilst living with her husband (*s*). Accordingly she will not, should she survive her husband, be bound by any disposition of her personal estate made on the separation, which her husband would have been unable to make, without her concurrence, had no separation taken place (*t*). If after separation the parties become reconciled (*u*), or if a restitution of conjugal rights

(*n*) *Jones v. Waite*, 4 Man. & Gr. 1104.*

(*o*) *Stephens v. Olive*, 2 Bro. C. C. 90; *Worrall v. Jacob*, 2 Meriv. 256, 269.

(*p*) See *Wilson v. Wilson*, 14 Sim. 405.

(*q*) See ante, pp. 229, 230.

(*r*) *Fitzer v. Fitzer*, 2 Atk. 511; *Clough v. Lambert*, 10 Sim. 174.

(*s*) *Lord St. John v. Lady St. John*, 11 Ves. 531.

(*t*) *Stamper v. Barker*, 5 Madd. 157; *Slatyer v. Slatyer*, 1 Yo. & Col. 28.

(*u*) *Bateman v. Ross*, 1 Dow, 235, 245; *Lord St. John v. Lady St. John*, 11 Ves. 537, *Wilson v. Wilson*, 15 Sim. 487, 500; see however *Hulme v. Chitty*, 9 Beav. 437.

assent cannot cause that to be a lawful conveyance of her estate, which, by the general rules of law, would not be so." *Estate of Wagner* 2 Ash. R. 448; *West v. West et als.*, 10 Serg. & Raw. R. 149; *Grimke v. Exec's of Grimke*, 1 Desauss. R. 366; *Exec's of Smellie v. Reynolds et als.*, *exec's*, 2 Id. 66; *Starret v. Wynn et al.*, 17 Serg. & Raw. R. 130; *Butler et al v. Buckingham*, 5 Day's R. 492; *Barton et al. v. Holly*, 18 Ala. R. 468; but, where the husband is sole heir of the wife, he may also consent to her disposal of the realty; *Wagner v. Ellis*, 7 Barr's R. 411.

In New Hampshire, New York, Pennsylvania, and several other States, a feme covert is empowered by statute to make a will of her real or personal estate. In the latter State, the wording of the act is as follows: "Any married woman may dispose, by her last will and testament, of her separate property, real, personal, or mixed, whether the same accrues to her before or during coverture; Provided, That said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband;" *Purd. Dig.*, (1853,) p. 570, sect. 9.

be decreed by the ecclesiastical court (*x*), the provisions of the deed of separation will thenceforth become inoperative.

In the event of separation, the custody of the infant children belongs by law to the father as the natural guardian (*y*). And it has been questioned, whether he is competent to relinquish a duty thrown upon him by the law, and whether, therefore, a covenant on his part [*307] *to give up the children to the care of their mother, be legal (*z*). If however the conduct of the father should be such that the children would be exposed to cruelty or gross corruption of morals from being left in his custody, the law will deprive him of a charge for which he has shown himself totally unfit (*a*) (1). And by

(*x*) *Fletcher v. Fletcher*, 2 Cox, 99.

(*y*) Co. Litt. 88 b. n. (12); *Rex v. Sherrington*, 3 Barn. & Adol. 714.*

(*z*) *Lord St. John v. Lady St. John*, 11 Ves. 531; see however *Lecone v. Sheires*, 1 Vern. 442; *Colston v. Morris*, 6 Madd. 89.

(*a*) *Cruise v. Hunter*, 2 Bro. C. C. 499; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Rex v. Greenhill*, 4 Adol. & Ell. 624.*

(1) In the case of the *United States v. Green*, 3 Mas. R. 485, Judge Story, speaking of this subject, says, "As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult his personal wishes. It will free it from all undue restraint, and endeavour, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose, that the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."

The principles contained in this decision are well supported by the authorities, for the father is in general entitled to the custody of his child; *Commonwealth v. Nutt*, 2 Brown's R. 143; In the matter of *Mitchell*, R. M. Charlton's R. 489; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. C. R. 497, S. C. 4 Sandf. C. R. 493; *The People v. Mercein*, 8 Paige's C. R. 47, S. C. 25 Wend. R. 64, and 3 Hill's R. 400; *The People v. Chegaray et al.*, 18 Wend. R. 637; *The People v. ———*, 19 Id. 16; In the matter of *Kottman*, 2 Hill's (S. C.) R. 363; *The State v. Paine*, 4 Humph. R. 523; *Miner v. Miner*, 11 Illo. R. 48; *The State v. Stigall et al.*, 2 Zab. R. 286; *Tarkington et als. v. The State*, 1 Cart. R. 171; *Valentine v. Valentine*, 2 Halst. C. R. 219; *Ex parte Schumpert*, 6 Richard. R. 344; *The Commonwealth v. Sears*, (D'Hauteville case,) Pamph. 1840, Philadelphia; yet, courts of justice may control this right, when the safety or interests of the child imperiously require it; In the matter of *Mitchell*, R. M. Charlton's R. 489; *The People v. Chegaray et al.*, 18 Wend. R. 637; *Cowls v. Cowls*, 3 Gilm. R. 440; *Miner v. Miner*, 11 Illo. R. 48. Thus, in cases of tender infancy

a recent act of parliament (*b*), power is given to the judges of the Court of Chancery (*c*), upon the petition of the mother of any infant,

(*b*) Stat 2 & 3 Vict. c. 51; *Ex parte Bartlett*, 2 Coll. 661.

(*c*) *In re Taylor*, 10 Sim. 291.

the custody of the children may be given to the mother in preference to the father; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. C. R. 497, S. C., 4 Sandf. C. R. 493; *Prather v. Prather*, 4 Desauss. R. 33; *The State v. Smith*, 6 Greenlf. R. 462; *The State v. Paine*, 4 Humph. R. 523; *Cowls v. Cowls*, 3 Gilm. R. 440; *The State v. Stigall et al.* 2 Zabr. R. 286; *Valentine v. Valentine*, 4 Halst. C. R. 219; *Ex parte Schumpert*, 6 Richard. R. 344; *Commonwealth v. Sears*, (D'Hauteville case,) Pamph. 1840, Philada. In *The Commonwealth v. Addicks*, 5 Bin. R. 520, the court gave the custody of two female children, one of ten and the other of seven years of age, to the mother, notwithstanding her husband had been divorced from her for her adultery; and, three years subsequently delivered them to the care of their father, "the children no longer requiring those attentions which a mother alone can properly bestow, and having arrived at an age when their morals were likely to be injured by bad example," *Commonwealth v. Addicks et al.*, 2 Serg. & Raw. R. 174; and see also, *Mercein v. The People*, 25 Wend. R. 64, and S. C., 3 Hill's R. 400; and female children of somewhat advanced age have sometimes been held to require the society and sympathy of their mother, as was held in *Miner v. Miner*, 11 Illo. R. 48, where Caston, J., says, "An infant of tender years is generally left with the mother, (if no objection to her is shown to exist,) even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of the mother to supply. This remark will apply with much force in cases of female children of a more advanced age. While the affections of parents for daughters may be equal, yet the mother, from her natural endowments, her position in

society, and her constant association with them, can give them that care, attention and advice, so indispensable to their welfare, which a father, if the same children were left to his supervision, would be compelled in a great degree to confide to strangers." So, where the father is leading a grossly immoral life, and the mother is a virtuous woman, she shall have the care and control of the children; *Williams v. Williams*, 4 Desauss. R. 183; *The People v. ———*, 19 Wend. R. 16; or if the father maltreats the children, or seeks to maintain possession of them for an ill purpose, he may be deprived of their company; *The People v. ———*, 19 Wend. R. 16; In the matter of *Kottman*, 2 Hill's (S. C.) R. 363; *Codd v. Codd*, 2 Johns. C. R. 141; and in a case where a child lived with its maternal grandfather, the mother being dead, and this was the only grandchild, the grandfather being rich, the court refused to give the custody of the child to the father, who was insolvent, although the paternal grandmother was able and willing to maintain it; upon the ground that the child's future prospects might be injured by such a decree; in the matter of *Waldron*, 13 Johns. R. 418, it seems also, that a father will not be allowed to keep his child if he cannot support it; *The People v. ———*, 19 Wend. R. 16; but in *Sandford v. Lebanon*, 31 Maine R. 124, it was decided, that although from the inability of a father to support his children, they had been in the care of the overseers of the poor as paupers, he did not thereby loose his right to have the custody of them. In the State of Pennsylvania, if a father cannot command or control his children, they may be sent to the House of Refuge; *Ex parte Crouse*, 4 Whart. R. 9. The above doctrines do not, however, apply to a stepfather, who is neither entitled to the

being in the sole custody of the father, or of any person by his authority, or of any guardian after the death of the father, to make

custody of his wife's children, nor liable for their support; *Williams v. Hutchinson*, 3 Comst. R. 312.

After the father, the mother is by law entitled to the custody of the children; *Dedham v. Nantick*, 16 Mass. R. 135; *Nightingale v. Withington*, 15 Id. 272; *Miner v. Miner*, 11 Illo. R. 48; *The Commonwealth v. Fee*, 6 Serg. & Raw. R. 254; *Armstrong v. Stone*, 9 Gratt. R. 102; and this is the case even where there is a testamentary guardian; *Foster v. Alston*, 6 How. (Missi.) R. 406. Where, however, both father and mother are persons of immoral character, the court may, in a dispute between them, order a child to be taken care of by some third person; *The Commonwealth v. Nutt*, 1 Browne's R. 143.

In New York, in cases of separation or divorce of man and wife, the court is, by statute, gifted with a discretionary power of determining who shall have the child or children of the marriage. In *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. C. R. 497, S. C., 4 Sandf. C. R. 493, the vice-chancellor, in commenting upon this statute, says, "The language of the present act is, that in any suit brought by a married woman for divorce, or for a separation from her husband, the court may, during the pendency of the cause, or at its final hearing, or afterwards, as occasion may require, make such order as between the parties, for the custody, care, and education of the children of the marriage, as may seem necessary and proper, and may vary and annul the same;" (2 R. S. 148, § 59). "I look upon this statute, especially where a decree has been pronounced for a separation, as neutralizing the rule of the common law; as annulling the superiority of the *patria potestas*, and placing the parents upon an equality as to the future custody of the children, even if it does not create a presumption in favour of the wife. And this is the case, because no decree for a separa-

tion can be pronounced, without evidence of such a violation of duty in one relation of life, as implies a probability of the disregard of every other. * * * Under our statute, this court might make the children wards of the court, appointing a guardian of their persons and estates, and regulating the right of access of both parents. It seems, however, that this power will be exercised only in cases of a separation of husband and wife by judicial decree or by mutual consent; and not where the wife, of her own accord, without justifiable cause, withdraws herself from the protection of her husband;" *The People v. ———*, 19 Wend. R. 16. And see *Barrere v. Barrere*, 4 Johns. C. R. 187; *Cook v. Cook*, 1 Barb. C. R. 639. Similar statutes exist in the States of Illinois and Indiana; *Miner v. Miner*, 11 Illo. R. 48; *Tarkington et als. v. The State*, 1 Cart. R. 171.

It would seem also, that an agreement between parents, upon a separation, as to the custody of their children, is void. This question was raised in *Mercein v. The People*, 25 Wend. R. 64, and was subsequently decided in the negative in the same case, reported in 3 Hill's R. 400. The more recent suit of *Cook v. Cook*, 1 Barb. C. R. 639, decided, that such an agreement can have no effect upon the discretion of the court under the New York statute. The *State v. Smith*, 6 Greenlf. R. 462, leans to the other side, but is not decisive.

The writ of *habeas corpus* is for the purpose of relieving a person from an unlawful restraint; consequently, on such a writ, the court will not, in general, determine who is entitled to the guardianship of the child, but will release him from illegal confinement; In the matter of *McDowles*, 8 Johns. R. 328; In the matter of *Wollstonecraft*, 4 Johns. C. R. 80; *Ex parte Schumpert*, 6 Richard. R. 344; *Armstrong v. Stone*, 9 Gratt. R. 102; and the child being of sufficient age will thus be allowed to go where he

order for the access of the petitioner to such infant at such times and subject to such regulations as shall be deemed convenient and just; and if such infant shall be within the age of seven years, to make order that such infant shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as shall be deemed convenient and just. If adultery has been established against the mother, no order can be made in her favor under this act (*d*).

When a separation takes place through the misconduct of the husband, by a decree of the ecclesiastical court, a separate maintenance under the name of *alimony*, is required to be paid to the wife by her husband (*e*). The allowance thus made is exclusively of ecclesiastical jurisdiction (*f*). If alimony be decreed and duly paid (*g*), *or [*308] if the husband otherwise allow his wife a sufficient separate maintainance (*h*), he will not be liable for any debts she may incur. But if she receive no such allowance (*i*), and the separation be not occasioned by her own misconduct (*k*), her husband will still remain liable for all debts incurred by her for necessaries suitable to her station in life (*l*). For as the husband is bound to maintain his wife, she has, as we have seen, an implied authority as his agent, to purchase all articles suitable for this purpose, with which he may have neglected to supply her (*m*).

A comparison of the laws of husband and wife relating to real

(*d*) Sect. 4.

(*e*) 2 Rep. Husb. and Wife, 209, note.

(*f*) *Vandergucht v. De Blaquiere*, 8 Sim. 315; 5 My. & Cr. 229, 241; *Stones v. Cooke*, 8 Sim. 321, note.

(*g*) *Wilson v. Smyth*, 1 Barn. & Adol. 801; * *Hunt v. De Blaquiere*, 5 Bing. 550.*

(*h*) *Mizen v. Pick*, 3 Mee. & Wels. 481.*

(*i*) *Kregan v. Smith*, 5 Barn. & Cress. 375.*

(*k*) *Todd v. Stokes*, 1 Ld. Raym. 444; *Etherington v. Parrot*, 2 Ld. Raym. 1006; *Morris v. Martin*, 1 Str. 647.

(*l*) 2 Rep. Husb. and Wife, 307; *Houliston v. Smyth*, 3 Bing. 127.*

(*m*) Ante, p. 301.

chooses; In the matter of *McDowles*, 8 Ex parte *Schumpert*, 6 Richard. R. 344; *Johns. R.* 328; In the matter of *Wollstonecraft*, 4 Johns. C. R. 80; In the matter of *Kottman*, 2 Hill's (S. C.) R. 363; *The Commonwealth v. Hamilton*, 6 Mass. R. 273; *The State v. Stigall et al.*, 2 Zab. R. 286; *Armstrong v. Stone*, 9 Gratt. R. 102; but if the child is not of sufficient age to decide for itself, the court will determine what is for its interest. See cases just cited.

estate, with those which affect personal property, will show a great discrepancy between them. Historically, no doubt, this discrepancy is easily accounted for; but practically, as things now exist, it is not so easy to give a satisfactory reason for the difference. Since the intended amendment of the law relating to dower, the wife's rights in her husband's real estate have, for the satisfaction of conveyancers, been reduced to as low a level as her rights in his personalty. But the husband's rights in his wife's property still materially vary, according as it may happen to be invested in real or in personal estate. If it consist of real estate, he has only a life interest as tenant by the curtesy, provided he has issue by his wife born alive, who might by possibility inherit as her heir (*n*). If it be personal estate, he has a right to appropriate to himself all that he can lay hands
 [*309] *on. Again, the real estate of the wife is guarded from alienation by the most careful provisions. Formerly the fictitious and cumbersome machinery of a *fine* was requisite; and now every conveyance of her real estate must be not only signed by her, but also *acknowledged* by her before commissioners, apart from her husband, as her own act and deed (*o*) (1). But the assignment of her personal estate, if made at all, can only be made by her husband; and her concurrence or objection is quite immaterial. When personal estate consists of mere moveable articles, the nature of the property no doubt affords a sufficient reason for the difference between the laws which dispose of it, and those which regulate estates in fixed and immoveable landed property. But when personalty assumes the form of such solid investments as mortgages or consols, when it becomes like land disposable by deed rather than by delivery, the laws which affect it should rather depend on its present nature than on its past history. It seems hardly fair that a married woman should have no voice in the disposition of property of this kind belonging to herself. At the same time, the present system of taking her acknowledgment on a conveyance of her real estate is often found to be a burdensome expense, without any practical benefit. For if a husband can persuade his wife to sign

(*n*) See Principles of the Law of Real Property, 167, 1st ed.; 177, 2d ed.; 184, 3d ed.

(*o*) Principles of the Law of Real Property, 171, 1st ed.; 181, 2d ed.; 188, 3d ed.

(1) In general, throughout the United States, the acknowledgment of a married woman to a deed conveying her real estate, is to be taken separate and apart from her husband, by a judge, commissioner, alder- man, or justice of the peace, as the case may be. The method in which this is to be done is pointed out with precision in the statutes of each state.

a deed, he can easily prevail on her to make an acknowledgment before two commissioners, notwithstanding that during the two minutes which the transaction lasts she may remain "separate and apart" from him. If, whenever the wife's property of any kind should be alienated by deed, her signature were necessary, but her separate examination were dispensed with, the law both of personal and real estate would perhaps be improved. The Court of Chancery, by the establishment of trusts for separate use, and by giving the wife an equity to a settlement of part of *her personal property when [*310] claimed through the medium of that court, has done much to mitigate the simple rigour of the common law. Trusts for separate use are now after much wavering, firmly settled, it is to be hoped, into a system according both with the interests of the community and the general principles of the law. Such trusts, however, generally require to be established by deed or will, and are very seldom implied. And the wife cannot assert her equity to a settlement without taking the serious step of making an application to the Court of Chancery. The theory of that court certainly is, that its assistance is free and open to everybody, and that those who neglect to avail themselves of its aid suffer by their own fault. Experience however is too apt to suggest that the remedy may sometimes prove worse than the disease.

[*311]

*PART V.

OF TITLE.

THE title to personal estate varies according as it may consist of money or negotiable securities, or of ordinary choses in possession, or of choses in action.

And first, with regard to money or negotiable securities, no title at all is required to be shown by the payer in any *bonâ fide* transaction. Thus if a sovereign or a bank note be offered in payment of a debt, it is no part of the duty of the creditor, under ordinary circumstances, to ask the debtor how he came by it. The reason of this rule is founded on the currency of the articles in question, and on the great inconvenience to trade and commerce which would ensue if the rule were otherwise (*a*). And the rule applies to all negotiable securities, that is, to all instruments the delivery of which passes the legal right to the property secured by them. Promissory notes and bills of exchange payable to bearer, or payable to order, and indorsed in blank are accordingly within the rule (*b*). But if there be any *mala fides* on the part of the person receiving any money or negotiable security, or such gross negligence as may amount in itself to evidence of *mala fides*, the true owner may recover such property, provided its identity can be ascertained (*c*)(1).

[*312] *With regard to ordinary choses in possession, a valid title to them is generally obtained by a purchase in an open market,

(*a*) *Miler v. Race*, 1 Burr. 452; 1 Smith's Leading Cas. 250.

(*b*) *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, 2 Doug. 333; see ante, p. 76.

(*c*) *Clarke v. Shee*, Cowp. 197; *Foster v. Pearson*, 1 C. M. & R. 849; * S. C. 5 Tyrw. 255; *Goodman v. Harvey*, 4 Ad. & El. 870.*

(1) See *Mauran v. Lamb*, 7 Cow. R. 174; R. 412; *Story on Bills*, 215; *Story on Pearce v. Austin*, 4 Wheat. R. 489; *Barbarin v. Daniels*, 7 La. R. 481; *Denton v. Duplessis*, 12 Id. 92; *Hill v. Holmes*, Id. 96; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, Id. 259; *Thurston v. McKown*, 6 Mass. R. 428; *Wheeler v. Guild*, 20 Pick. R. 545; *Aldrich v. Warren*, 16 Maine R. 465; *Lapice v. Clifton*, 17 La. R. 152; *Munroe v. Cooper*, 5 Pick. R. 412; *Story on Bills*, 215; *Story on Promissory Notes*, 465, 469, 470. The doctrine that possession carries with it the evidence of property, so as to protect a person acquiring it in the usual course of trade, is limited to cash, bank bills, and bills payable to bearer, *Saltus et al. v. Everett*, 20 Wend. R. 267, and probably the securities commonly called Coupon Bonds, will be treated as belonging to the same class.

or *market overt*, although no property may have been possessed by the vendor (*d*) (1). And every shop in the city of London, where goods are openly sold, is considered as a market overt within this rule, for such things as by the trade of the owner are put there for sale (*e*). But the shops at the west end of the town do not appear to possess this privilege. If the sale is not made in market overt, the purchaser, though he purchase *bonâ fide*, acquires no further property in the article sold than was possessed by the vendor (*f*). If therefore a writ of execution should be actually in the hands of the sheriff on a judgment against the vendor, the goods, if not sold in market overt, will be subject, in the hands of the purchaser, to the sheriff's right to seize, in the same manner as if they had remained in the hands of the vendor (*g*). So if the goods have been stolen, a *bonâ fide* purchaser, who has not bought them in market overt, will be bound to restore them to the true owner (*h*); whereas, in either of the above cases, a sale in market overt would have given the purchaser a valid title. There is one case, however, in which even a sale in market overt will not pro-

(*d*) 2 Black. Com. 449.

(*e*) The case of Market Overt, 5 Rep. 83 b; Lyons v. De Pass, 11 Ad. & El. 326.*

(*f*) Peer v. Humphrey, 2 Ad. & El. 495; * White v. Spettigue, 13 Mee. & W. 603.*

(*g*) Samuel v. Duke, 3 Mee. & W. 622; see ante, p. 46.*

(*h*) White v. Spettigue, 13 Mee. & W. 603.*

(1) There are no markets overt in the United States; Hosack v. Weaver, 1 Yeat. R. 478; Hardy v. Metzgar, 2 Id. 347; Easton v. Worthington, 5 Serg. & Raw. R. 130; Lecky v. McDermott, adm'r, 8 Id. 500; Mowry et als. v. Walsh, 8 Cow. R. 238; Wheelright v. Depeyster, 1 Johns. R. 480; Dane v. Baldwin, 8 Mass. R. 518; Browning v. Magill, 2 Har. & Johns. R. 308; McGrew v. Browder, 2 Condens. Rep. S. C. La. 579; Roland v. Grundy, 5 O. R. 202; Griffith v. Fowler, 18 Vt. R. 390; Worthy et al. v. Johnson et al., 8 Geo. R. 236; Hoffman et als. v. Carow, 22 Wend. R. 285. In the case of Ventress et al. v. Smith, 10 Pet. R. 175, Judge Thompson, said, "It is a general rule of law, that a sale by a person who has no right to sell, is not valid against the rightful owner. * * * It was a maxim of the civil law, that, *nemo plus juris in alium transferre potest, quam ipse habet*; and this is a plain

dictate of common sense. It was a principle of the English common law that, a sale out of market overt, did not change the property from the rightful owner; and the custom of the city of London, which forms an exception to the general rule, has always been guarded and restricted by the courts with great care and vigilance, that all such sales should be brought strictly within the custom. It has sometimes been contended, that a *bona fide* purchase for a valuable consideration and without notice, was equivalent to a purchase in market overt under the English law and bound the property against the party who had the right. But we are not aware that this Saxon institution of markets overt, which controls and interferes with the application of the common law, has ever been recognized in any of the United States, or received any judicial sanction."

tect a purchaser, namely, the case of the goods having been stolen, and the true owner prosecuting the thief and obtaining his conviction. In this case the property in the goods, wherever they may be, vests, on the conviction, in the true owner (*i*); and the only exception allowed is, where the article stolen is some valuable security, which [*313] shall *have been paid or discharged *bonâ fide* by the person liable, or, being a negotiable instrument, shall have been *bonâ fide* transferred or delivered for a just and valuable consideration, without any notice, and without any reasonable cause to suspect that the same had been obtained by any felony or misdemeanor (*j*). If a person suffer the loss of his goods by theft, he cannot by any civil action recover them from the felon (*k*). To do this, he is bound to suffer the further loss of time or money incurred in a prosecution. If he should succeed in obtaining a conviction, he is then rewarded for his good fortune by a restitution of his property, whether in the hands of the felon himself, or of any innocent purchaser who may have chanced to buy them, although in open market (*l*). Such is the application made by the law of the righteous principle of restitution.

With regard to horses, a sale in market overt will not confer on the purchaser any further title than is possessed by the vendor, unless the sale be made according to the directions of certain statutes (*l*); and even then the true owner may at any time within six months after his horse has been stolen, recover his property on tender to the person in possession of the price he *bonâ fide* paid for it (*m*).

A factor or agent in the possession of goods could not by the common law give any further title to the goods than he was authorized to do by his principal, either expressly or by implication arising from the usual course of his employment (*n*). And when one man is appointed

(*i*) Scattergood v. Sylvester, 15 Q. B. 506.*

(*j*) Stat. 7 & 8 Geo. IV. c. 29, s. 57.

(*k*) Stone v. Marsh, 6 Barn. & Cress. 551, 564; * 2 Wms. Saund. 47 b. n. (*p*)

(*l*) Stats. 2 & 3 P. & M. c. 7; 31 Eliz. c. 12; 2 Black. Com. 450.

(*m*) Stat. 31 Eliz. c. 12, s. 4.

(*n*) Pickering v. Busk, 15 East, 38, 43.

(1) See *Piscataqua Bank v. Turnley*, 1 Miles' R. 314, which decided, that where A. had stolen a quantity of bank notes, the bank could not maintain foreign attachment against him, because the foundation of the claim was matter *ex delicto*. But in *New York*, the doctrine that the private injury is merged in the public wrong, is abolished by statute; see a note to the case of *Hoffman et als. v. Carow*, 22 Wend. R. 285.

*the agent of another for any particular purpose by power of attorney, his authority must still be strictly pursued, otherwise his principal will not be bound (o) (1). But by modern acts of parlia- [*314]

(o) *Attwood v. Munnings*, 7 Barn. & Cress. 278.*

(1) "That an agent is bound to pursue the orders of his principal, and is answerable for any injury consequent on his departure from them, however fair may have been his motives for such departure, is a plain principle of law;" *Manella, Pujalls & Co. v. Barry*, 3 Cranch's R. 415; *Keener v. Harrod et al.*, 2 Md. R. 63; nor will the principal be bound for his acts, whether the agency be general or special, if it was known to the party with whom he dealt that the agent was exceeding his powers; *Sandford v. Handy*, 23 Wend. R. 260; *State of Illinois v. Delafield*, 8 Paige's C. R. 527; *Fox v. Fisk*, 6 How. (Missi.) Rep. 328; *Longworth v. Conwell*, 2 Blackf. R. 469; *Walsh et al. v. Peirce*, 12 Vt. R. 138; *Hemphill v. The Bank*, 6 Smed. & Mar. R. 44; *Goad v. Hurts' adm'rs*, 8 Id. 787; *Robertson v. Ketchum*, 11 Barb. S. R. 652; *Reeves et al. v. Baldwin*, 1 Cart. R. 216; *McCoy v. McKowen, adm'r*, 26 Missi. R. 487; *Lewin v. Delie et al.*, 17 Missi. R. 64; *North River Bank v. Aymar*, 3 Hill's R. 266; *Bank of the United States v. Dunn*, 6 Pet. R. 51; *Bank of the Metropolis v. Jones*, 8 Id. 12; *Angel v. The Town of Pownal*, 3 Vt. R. 461; *Huntington et al. v. Wilder*, 6 Id. 334.

A special agent is one who is employed about one specific act, or certain specific acts alone; *Walker v. Skipwith*, 1 Meigs's R. 507; *Bryant v. Moore*, 26 Maine R. 86; a general agency, however, is not the reverse of this, and does not mean the substituting one in the place of another, for transacting all manner of business, since there are few instances in common use of an agency of that description, but is an authority not unlimited, and must necessarily "be restrained to the transactions and concerns appurtenant to the business of the principal;" *Odiorne et al. v. Maxey et al.*, 13 Mass. R. 181; *Salem Bank v.*

Gloucester Bank, 17 Id. 29; *Walker v. Skipwith*, 1 Meigs's R. 507; *Anderson v. Coonley*, 21 Wend. R. 279; *Rossiter v. Rossiter*, 8 Id. 494; *Stowe et al. v. Wyse*, 7 Conn. R. 214. A distinction is to be noticed between general and special agencies, as regards third persons, for although in the former an attorney in fact will be responsible to his principal, if he exceeds any private instructions which may be given limiting his general powers, yet the persons with whom he deals will not be bound by such private instructions, for they cannot be supposed to know anything about them; *Lobdel v. Baker*, 1 Metcf. R. 193; *Mann v. The Commiss. Co.*, 15 Johns. R. 54; *Beals v. Allen*, 18 Johns. R. 363; *Allen v. Ogden*, 1 Wash. C. C. R. 174; *Gordon et al. v. Buchanan et al.*, 5 Yerg. R. 71; *Rossiter v. Rossiter*, 8 Wend. R. 494; *Tradesmen's Bank v. Astor et al.*, 11 Id. 90; *Jaques v. Todd*, 3 Id. 83; *Fisher et al. v. Campbell*, 9 Port. R. 213; *Longworth v. Conwell*, 2 Blackf. R. 469; *Morrison's exec. v. Taylor*, 6 B. Mon. R. 85; *Johnson v. Jones*, 4 Barb. S. R. 369; *Walsh et al. v. Peirce*, 12 Vt. R. 138; *Gibbs et al. v. Linsley*, 13 Id. 208; *Arnold et al. v. Halenbrake et al.*, 5 Wend. R. 34; *Bryant v. Moore*, 26 Maine R. 86; *Lamothe v. St. Louis Marine Railway and Dock Co.*, 17 Misso. R. 204; *Lighthody v. The N. A. Ins. Co.*, 23 Wend. R. 22; *Lance v. Barrett*, 1 Hill's (S. C.) R. 204; *Lagow v. Patterson*, 1 Blackf. R. 252; whereas, in special agency the authority must be strictly pursued, or the principal will not be bound; *Schimmelpenich et al. v. Bayard et al.* 1 Pet. R. 264; *Andrews v. Kneeland*, 6 Cow. R. 354; *Lighthody v. The N. American Ins. Co.*, 23 Wend. R. 22; *Lobdell v. Baker*, 1 Metcf. R. 193; *Anderson v. Coonley*, 21 Wend. R. 279; *Mann v. The Commiss. Co.*, 15 Johns. R. 54; *Beals v. Allen*, 18 Id.

ment a more extended authority has, for the convenience of commerce, been conferred on factors and agents (*p*). The provisions of these

(*p*) Stat. 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39.

363; *Thompson v. Stewart*, 3 Conn. R. 183; *Allen v. Ogden*, 1 Wash. C. C. R. 174; *Bleene v. Proudfit*, 3 Call's R. 207; *Gordon et al. v. Buchanan et al.*, 5 Yerg. R. 71; *Rossiter v. Rossiter*, 8 Wend. R. 494; *Tradesmen's Bank v. Astor et als.*, 11 Wend. R. 90; *Denning v. Smith*, 3 Johns C. R. 344; *State of Illinois v. Delafield*, 8 Paige's C. R. 527; *Jaques v. Todd*, 3 Wend. R. 83; *Fisher et al. v. Campbell*, 9 Port. R. 213; *Dresser Manufacturing Co. v. Waterston et als.*, 3 Metcf. R. 18; *Cowan v. Adams et al.*, 10 Maine R. 374; *Morrison's exec. v. Taylor*, 6 B. Mou. R. 85; *Lance v. Barrett*, 1 Hill's (S. C.) R. 204; *Lagow v. Patterson*, 1 Blackf. R. 252; *Thorndike v. Godfrey*, 3 Greenlf. R. 431; *Dehart, &c., v. Wilson, &c.*, 6 Mon. R. 581; *Adm'rs. of Mitchell et al. v. Sproul*, 5 J. J. Marsh. R. 267; *Powell v. Buck*, 4 Strobb. R. 427; *Scott v. McGrath*, 7 Barb. S. R. 53; *Reany v. Culbertson*, 9 Harris's R. 507; *Shepley v. Little*, 6 Wat. R. 500; *Parsons v. Webb*, 8 Greenlf. R. 38; *Stewart v. Donnelly*, 4 Yerg. R. 177; *Snow v. Perry*, 9 Pick. R. 539; *Arnold et al. v. Hallenbrake et al.*, 5 Wend. R. 84; and one dealing with a special agent is bound to inquire, and ascertain the extent of his authority; *Schimmelpenich et al. v. Bayard et als.*, 1 Pet. R. 264; *Snow v. Perry*, 9 Pick. R. 539; *Fisher et al. v. Campbell*, 9 Port. R. 213; *Murdoch v. Mills et als.*, 11 Metcf. R. 5; *Powell v. Buck*, 4 Strobb. R. 427; particularly where one is acting in a public capacity, or as the representative of a corporation, for then the limit of his power may be readily ascertained by a reference to statutes or records; *Salem Bank v. Gloucester Bank*, 17 Mass. R. 29; *Bryant v. Moore*, 26 Maine R. 86; *Denning v. Smith*, 3 Johns. C. R. 344. But even in the case of a limited agency the deputy may have a general authority to accomplish the purpose for which he was created,

"or be limited to do it in a particular manner. If the limitation, respecting the manner of doing it be public or known to the person, with whom he deals, the principal will not be bound, if the instructions are exceeded and violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts." *Bryant v. Moore*, 26 Maine R. 86; *Hotch v. Taylor*, 10 N. H. R. 538; *Walker v. Skipwith*, 1 Meigs's R. 507; *Lightbody v. The N. A. Ins. Co.*, 23 Wend. R. 22; *N. River Bank v. Aymar*, 3 Hill's R. 266; and if the principal has by his declarations given rise to the opinion that he has granted greater powers than have in fact been given, he will not be allowed to avail himself of the imposition, to ward off responsibilities which have arisen from his representations; *Schimmelpenich et al. v. Bayard et als.*, 1 Pet. R. 264; *Perkins v. The Washington Insurance Co.*, 4 Cow. R. 645.

In accordance with the above principles it has been held, that a factor cannot pledge the goods of his principal; *Kinder et al. v. Shaw et al.*, 2 Mass. R. 398; *Van Amringe v. Peabody et al.*, 1 Mas. R. 440; *Rodriguez v. Hofferma et als.*, 5 Johns. C. R. 417; *Evans v. Potter*, 2 Galls. R. 13; *Kelly et als. v. Smith et als.*, 1 Blatch. R. 290; and the reason is that his authority is only to sell, *Laussatt v. Lippincott et al.*, 6 Serg. & Raw. R. 391; nor can he deliver the goods of his principal to a creditor in payment of his own debt, even though he have a lien upon them; *Benny et al. v. Rhodes*, 18 Misso. R. 147; *Same v. Pegram*, Id. 191; but if the factor has a lien he may pledge the goods for his own debt to the amount of the lien, *Warner v. Martin*, 11 How. R. 209; where, however, an agent has pledged his employer's goods he does not thereby lose his right to sell them;

acts are too long to be here inserted; but their general effect is to render valid sales and pledges made by factors or agents, notwith-

and if he does so, and the pledgee afterwards disposes of them, he will be liable to the purchaser; *Nowell et al. v. Pratt et al.*, 5 Cush. R. 111; but by statute, generally, a factor may pledge his principal's goods, and if the pledgee takes with notice that the pledgor is a factor, he will acquire only the lien which the factor had; if, however, he takes without notice, he will have the same interest as he would if the factor had been owner. An agent authorized to assist in a settlement, has no power to pledge; *Swelt et al. v. Brown*, 5 Pick. R. 178; *Wood v. McLain*, 7 Ala. R. 800; *Jones v. Farley*, 6 Greenl. R. 226; *Hewes v. Doddridge*, 1 Rob. (Va.) R. 143; nor is a power to settle, a power to arbitrate; *Huber v. Zimmerman*, 21 Ala. R. 488. A power to draw notes, is not fulfilled by giving a bond; *Banorjee v. Hovey et als.*, 5 Mass. R. 11; and when authorized to be drawn or endorsed for one purpose, the authority does not extend to negotiating them for any other object; *Hortons et al. v. Towners*, 6 Leigh's R. 47; *Planters' Bank v. Cameron et al.*, 3 Smed. & Mar. R. 609; *Suckley v. Turner et al.*, 1 Brev. R. 257, S. C., 2 Bay's R. 505; *Palmer v. Garrington*, 1 O. N. S. 253; so if directed to be drawn payable on a certain day, they cannot be made payable at an earlier time; *Batty v. Carswell et al.*, 2 Johns. R. 48; *Tate et als. v. Evans et als.*, 7 Misso. R. 419; in the case of *The Bank of the United States v. Bevine et als.*, 1 Gratt. R. 539; where nine persons jointly authorized J. B. S. to endorse for them jointly all notes drawn payable to J. B. S., it was held that this power did not extend to the endorsing of a note drawn payable to one of the principals. On the other hand, an agent cannot bind his principal by giving a note, when he is merely authorized to pay a sum of money; *Webber v. The President, &c. of William's College*, 23 Pick. R. 302; *Savage v. Rix et al.*, 9 N. H. R. 263; or to make purchases; *Taber v. Cannon et als.*, 8

Metcf. R. 456; *Emerson et al. v. The Providence Hat Manufacturing Co.*, 12 Mass. R. 237; *Denison v. Tyson*, 17 Vt. R. 550; or to manage a grocery, *Smith et al. v. Gibson*, 6 Blackf. R. 369; or to take care of a plantation, *Scurborough v. Reynolds*, 12 Ala. R. 252; nor will a power to receive and pay debts, or take notes, or construct carriages, authorize the issuing of a promissory note; *Martin v. Walton & Co.*, 1 McCord's R. 16; *McCulloch v. McKee*, 4 Harris's R. 289; *Paige v. Stone et al.*, 10 Metcf. R. 160; *Hays et al. v. Lynn*, 7 Wat. R. 524. A power to purchase, with money furnished for that purpose, is no power to buy on credit; *Boston Iron Co. v. Hale*, 8 N. H. R. 363; *Patton v. Brittain*, 10 Ired. R. 8; nor is the credit system allowable to one who is empowered to conduct a business on cash principles, *Stoddard & Co. v. Milvain et al.*, 7 Rich. R. 525. There are many similar cases deciding that an agent's power is to be restricted to the authority creating him; *Heffernan v. Adams*, 7 Wat. R. 116; *Hopkins v. Blanc*, 1 Call's R. 361; *Calef v. Foster*, 32 Maine R. 92; *Shriver v. Stevens*, 2 Jones's R. 258; *Hampton et al. v. Matthews et al.*, 2 Harris's R. 105; *Nash v. Drew*, 5 Cush. R. 422; *Soule v. Dougherty*, 24 Vt. R. 92; *Yrquhart v. McIver*, 4 Johns. R. 113; *Ives v. Davenport*, 3 Hill's R. 273; And see *Cox et al. v. Robinson*, 2 Stew. & Port. R. 91. Where a personal trust or confidence is reposed in an agent, and especially where the exercise or application of the power is made subject to his judgment or discretion, the authority is purely personal, and cannot be delegated to another, unless he has a special power of substitution; *Lyon v. Jerome*, 26 Wend. R. 485; *Warner et als. v. Martin*, 11 How. R. 209; *Blantin et al.* 5 Whitaker et als., 11 Hump. R. 313; *Pruitt v. Miller*, 3 Port. R. 16.

In the cases of *Gibson v. Colt et als.*, 7 Johns. R. 390; *Nixon v. Hyserott et al.*, 5 Id. 159; and *Liscomb v. Kiterell*, 11 Hump.

standing any notice of the fact of their being merely factors or agents, provided the party dealing with them have no notice that they are acting without authority or *malá fide*.

R. 256, it was held that a power to sell did not authorize a covenant of warranty, but the two former cases have been overruled, and the prevailing opinion is, that an agent who is empowered to sell is presumed to possess the power of warranting, unless the contrary appear; *Nelson v. Cowing et al.*, 6 Hill's R. 336; *Woodford v. McClanahan*, 4 Gilm. R. 85; *Peters v. Farnsworth*, 15 Vt. R. 155; *Taggart v. Stanberry*, 2 McLean's R. 543; *Skinner v. Gunn et al.*, 9 Port. R. 305; *Gaines v. McKinley*, 1 Ala. R. 446; *Cocke v. Campbell*, 13 Id. 286; in other words, a power to sell implies a power to warrant; for every power whether general or special includes all means necessary for carrying it into effect or operation, which is in accordance with the legal maxim *cui cunque aliquid conceditur etiam et id sine quo res ipsa non esse potest*; *Peck et al. v. Harriott et al.*, 6 Serg. & Raw. R. 146; *Andrews v. Kneeland*, 6 Cow. R. 354; *The Chesapeake Ins. Co. v. Stark*, 6 Cranch's R. 268; *Perrotin v. Cuculla*, 6 La. R. 587; *N. River Bank v. Aymar*, 3 Hill's R. 266; *The Merchants' Bank of Geo. v. The Central Bank of Geo.*, 1 Kelly's R. 418; *Rouse et al., overseers, &c., v. Moore et al., overseers, &c.*, 18 Johns. R. 407; *Andover v. Grafton*, 7 N. H. R. 298; *Sandford v. Handy*, 23 Wend. R. 260; *Valentine v. Piper*, 22 Pick. R. 92; *Vanada's heirs v. Hopkins, adm'r, &c.*, 1 J. J. Marsh. R. 285; *Wilson v. Troup*, 2 Cow. R. 197; *Goodale v. Wheeler*, 11 N. H. R. 424; *Babcock v. The Western Railroad Corporation*, 9 Metcf. R. 556; hence, where an agent is directed to purchase, and no money is furnished, he may buy on credit; *Sprague et al. v. Gillett et al.*, 9 Metcf. R. 91; *Chomqua v. Mason et al.*, 6 Gallis. R. 342; and it is presumed that goods are to be sold, when placed in the possession of one whose business it is to sell, *Gibbs et al. v. Linsley*, 13 Vt. R. 208; so in all cases where no express direction is given in regard to the manner of performing the duty, it is implied that it is to be done in the ordinary way, and that any custom or known usage shall be followed; *Van Allen v. Vanderpoel*, 6 Johns. R. 69; *James et al. v. McCredie et al.*, 1 Bay's R. 294; *State of Illinois v. Delafield*, 8 Paige's C. R. 527; *McClure v. Richardson*, Rice's R. 218; *Ives v. Davenport*, 3 Hill's (N. Y.) R. 373; *May v. Mitchell*, 5 Hump. R. 365; *Leland v. Douglass*, 1 Wend. R. 490; *Frost v. Wood*, 2 Conn. R. 23; *Bates v. The Keith Iron Co.*, 7 Metcf. R. 225; *Owings v. Hall*, 9 Pet. R. 608; *Fraser & Co. v. Tenants & Co.*, 5 Richard. R. 375. But the implied powers of agents will not extend beyond the regular and general course of their business employment; *Jones v. Warner*, 11 Conn. R. 11; *Pourie et al. v. Frasier*, 2 Bay's R. 269; *Topham v. Roche*, 2 Hill's (So. Car.) R. 307; *Kerns v. Piper*, 4 Wat. R. 222; *Washington Bank v. Lewis*, 22 Pick. R. 24; *Cox v. Hoffman*, 4 Dev. & Bat. R. 180.

The principal may ratify the acts of an agent who has exceeded his powers; and if being informed of the disobedience of his orders, the principal makes no objection, or is silent respecting it, it is considered a recognition of his agent's acts; *Courcier v. Ritter*, 4 Wash. C. C. R. 549; *Snow v. Perry*, 9 Pick. R. 539; *Cox et al. v. Robinson*, 2 Stew. & Port. R. 91; *The Merchants' Bk. of Geo. v. The Central Bk. of Geo.*, 1 Kelly's R. 418; *Wood v. McCain*, 7 Ala. R. 890; *Despatch Line of Packets v. Bellamy Manufacturing Co., &c.*, 12 N. H. R. 205; *Weed et al. v. Carpenter*, 4 Wend. R. 219; *Bosley v. Farquhar et al.*, 2 Blackf. R. 61; *Hotch v. Taylor*, 10 N. H. R. 538; *Patton v. Britain*, 10 Ired. R. 8; *Burrits, survivors, v. Rench et al.*, 4 McLean's R. 325; *Very v. Levy*, 13 How. R. 345; *Cowan v. Wheeler*,

In ancient times the sale of lands was usually accompanied by a warranty of their title; and some words, such as the word *give* in a feoffment, had the effect of an implied warranty, when none was ex-

31 Maine R. 439; Bigelow et al. v. Denison, 33 Vt. R. 565; Blantier et als. v. Whitaker et als., 11 Hump. R. 313; Little v. Stillheimer, 13 Misso. R. 572; such a ratification relates back to the time of the granting of the original power, and is equivalent to an authority given in the first instance; Perry v. Hudson, 10 Geo. R. 362; Irons v. Reyburn, 6 Eng. R. 378; but this adoption cannot be apportioned, extending only to a part of the acts of the agent, and rejecting others, but must embrace the whole or nothing; Hoductt v. Tatum, 9 Geo. R. 70; Crawford et al. v. Barkley, 18 Ala. R. 270.

In order to authorize the inference of a general agency, it is not necessary that the person should have done an act the same in species with that in question; for if he have usually done things of the same general character and effect with the assent of his principal, it is enough; Commercial Bk. v. Norton et al., 1 Hill's (N. Y.) R. 501; Arnold et al. v. Halenbrake et al., 5 Wend. R. 34; and where an agency is proved, and its extent is not shown, the presumption is, that it is a general agency; Methuen Co. v. Hayes, 33 Maine R. 169.

In the case of Williams v. Shackelford, 16 Ala. R. 318, W., who was a resident of North Carolina, "executed to C. of the same State, a power of attorney to receive a slave from S., who resided in Alabama, and then sell him. C., passing through Alabama on his way to Mississippi, received the slave from S., and endeavoured to sell him, but failed to do so: he then endeavoured to hire him, but in this also was unsuccessful; and not being authorized to incur the expense of taking the slave along with him in the stage—the mode of conveyance by which he was travelling—he therefore left him with S. free of hire, until W. could be informed of the circumstances, and make some other disposition of the slave;" it was held, that in this

unforeseen emergency the agent acted in the line of his duty, and that S. was not liable for the hire of the slave.

The opinion of Chief Justice Collin, in the case of Dearing v. Lightfoot, 16 Ala. R. 31, contains an epitome of the subject of this note; he says, "Powers of attorney are ordinarily subject to a strict construction, and the authority is never extended beyond that which is given in terms, or is necessary and proper for carrying the authority so given into full effect. * * *

But in all cases, whether the agency be general or special, it is said to be a universal principle, that unless the inference is expressly excluded by other circumstances, it includes all the usual modes and means of accomplishing the objects and aims of the agency. * * *

The distinction between a *general* and *universal* agent is recognized, and it was said, that such a universal authority as the latter may exercise, will never be inferred from any general expression however broad, but the law will restrain them to the particular business of the party, in respect to which it is presumed, his intention to delegate the authority was principally directed.

* * * the difference between a *general* and a *special* agent, is said to be this; the former is appointed to act in the affairs of his principal generally, and the latter to act concerning some particular object. In the former case the principal will be bound by the acts of his agent, *within the scope of the general authority conferred on him*, although those acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special power conferred on him, the principal is not bound by his acts. * * *

Although the acts of the agent may be inoperative against the principal, yet it is competent for the latter to ratify them."

pressed (*q*) (1). When warranties fell into disuse, the purchasers of lands acquired a right to covenants for the title, varying in their stringency according to the nature of the title of the vendor (*r*). No warranty however arises from the mere sale of goods, unless it be expressly given, or implied from the custom of the trade or the nature of the contract (*s*). Every affirmation made by the vendor at the time of sale respecting the goods is an express warranty, if it appear to have been so intended (*t*). And if the vendor state that the goods are his own, this amounts to a warranty of his title (*u*); but if the contract [*315] for sale be in writing, the warranty must be in writing also (*x*). And a warranty made subsequently to the sale is void for want of consideration (*y*). Contracts made in the course of any trade are always subject to the custom of that trade; and if by the custom of the trade a warranty is implied in any contract, the vendor will be bound by it, in the same manner as if he had given an express warranty (*z*). So the nature of the contract may be such as to imply a warranty. Thus a contract to furnish goods for a particular purpose, contains an implied warranty that they are fit for that purpose (*a*); and a contract to furnish manufactured goods implies a warranty that they shall be of a merchantable quality (*b*) (2).

(*q*) See Principles of the Law of Real Property, 344, 1st ed.; 346, 2d ed.; 359, 3d ed.

(*r*) Ibid. 348, 1st ed.; 349, 2d ed.; 362, 3d ed.

(*s*) *Chanter v. Hopkins*, 4 Mee. & W. 399; * *Burnby v. Bollett*, 16 Mee. & W. 644; * *Morley v. Attenborough*, 3 Exch. Rep. 500.*

(*t*) See *Richardson v. Brown*, 1 Bing. 344; * *Sheppard v. Kain*, 5 Barn. & Ald. 210; * *Power v. Barham*, 4 Ad. & Ell. 473.*

(*u*) *Furniss v. Leicester*, Cro. Jac. 474; *Medina v. Stoughton*, 1 Salk. 210.

(*x*) *Pickering v. Dowson*, 4 Taunt. 779.

(*y*) *Finch*, L. 189; see ante, p. 65.

(*z*) *Jones v. Bowden*, 4 Taunt. 847.

(*a*) *Jones v. Bright*, 5 Bing. 533; *Brown v. Edgington*, 2 Man. & Gr. 279.*

(*b*) *Laing v. Fidgeon*, 6 Taunt. 108.*

(1) See "Rawle on Covenants for Title," 11 Wend. R. 411; *Ricks, adm'r, v. Dillahunty*, 8 Port. R. 134; *Towell et al. v. Gatewood*, 2 Seam. R. 22; *Beeman v. Black*, 3 Vt. R. 53; *Banfield v. Brutton*, 7 B. Mon. R. 108; *Corley v. Wilkins*, 6 Barb. S. R. 557; *Hawkins v. Berry*, 5 Gilm. R. 36; and, even where the word "warrant" has been used, there is still room to doubt whether a technical warranty was intended; *Starnes et al. v. Erwin*, 10 Ired. Har. & Gill's R. 429; *Whitney v. Sutton*, R. 226; *Isley v. Stewart*, 4 Dev. & Bat.

(2) No particular form of words is required to constitute a warranty of personal property, nor is the word "warrant" necessary; *Bacon v. Brown*, 3 Bibb's R. 35; *Chapman v. Murch*, 19 Johns. R. 290; *Roberts v. Morgan*, 2 Cow. R. 438; *The Onondaga Manufacturing Soc. v. Lawrence et al.*, 4 Cow. R. 440; *Osgood et al. v. Lewis*, 2 Har. & Gill's R. 429; *Whitney v. Sutton*, R. 226; *Isley v. Stewart*, 4 Dev. & Bat.

If goods and cattles should have come into the possession of persons having no title to them, such persons will, in course of time, be quieted

R. 160. But a mere representation, affirmation, or description, does not amount to a warranty, even though the property should turn out to be entirely different from the article described, or spurious; *Barrett v. Halls*, 1 Aik. R. 269; *Dyer v. Lewis*, 7 Mass. R. 284; *Jackson v. Wetherill*, 7 Serg. & Raw. R. 480; *Hyatt v. Boyle*, 5 Gill & Johns. R. 110; *Hogins v. Plympton*, 11 Pick. R. 97; *Stewart v. Dougherty*, 3 Dana's R. 479; *Welsh v. Carter*, 1 Wend. R. 185; *Whitman v. Freese et al.*, 23 Maine R. 212; *Wason v. Rowe*, 16 Vt. R. 525; *McFarland v. Newman*, 9 Wat. R. 55; *Banfield v. Brutton*, 7 B. Mon. R. 108; *Lamb v. Crafts*, 12 Metc. R. 355; *The Richmond Trading and Manufacturing Co. v. Farquhar*, 8 Blackf. R. 89; *Humphreys v. Comline*, Id. 508; *Hawes et al. v. Lawrence et al.*, 4 Comst. R. 345; *Mackay v. Rhinelanders et als.*, 1 Johns. Cas. 408; and the purchaser cannot claim indemnity if the goods differ in quality or kind from those represented unless there has been an express warranty, or fraud, or such circumstances as will amount in law to an implied warranty; *Snell et al. v. Moses et als.*, 1 Johns. R. 86; *Perry v. Aaron*, Id. 129; *Seixas et al. v. Woods*, 2 Caines' R. 48; *Holden v. Dakin*, 4 Johns. R. 421; *Davis v. Meeker*, 5 Id. 354; *Sands et al. v. Taylor et al.*, Id. 404; *Cunningham v. Spier*, 13 Id. 392; *Kimmel v. Lichty*, 3 Yeat. R. 262; *Allen v. Cockerill*, 4 Bibb's R. 264; *Wilson v. Shackelford*, 4 Rand. R. 5; *Neilson et al. v. Dickerson*, 1 Desauss. R. 133; *Kingsbury v. Taylor*, 29 Maine R. 508; *Carley v. Wilkins*, 6 Barb. S. R. 557; nor can he complain, for "if he is unwilling to trust his own judgment he may insist upon a warranty of the quality," and this will be binding even where the goods have been examined by the buyer; *Willings et al. v. Consequa*, Pet. C. C. R. 317, S. C. Id. 172; where, however, a representation or description, is understood by the parties as an absolute assertion, as contradistinguished from a mere expression of opinion, it is a warranty; *The Oneida Manufacturing Co. v. Lawrence et als.*, 4 Cow. R. 440; *Osgood et al. v. Lewis*, 2 Har. & Gill's R. 495; *Kinley v. Fitzpatrick*, 4 How. (Miss.) R. 59; *Morrill v. Wallace et al.*, 9 N. H. R. 111; *Baum v. Stevens*, 2 Ired. R. 411; *Erwin v. Maxwell*, 3 Murph. R. 241; *Ayres v. Parks*, adm'r, 3 Hawkes' R. 89; *Gilchrist v. Marrow*, 2 Carol. L. Repos. 608; *Foggart v. Blackweller et al.*, 4 Ired. R. 238; *House v. Firt*, 4 Blackf. R. 293; *Winsor et al. v. Lombard*, 18 Pick. R. 57; *McFarland v. Newman*, 9 Wat. R. 55; *Foster v. Caldwell*, 18 Vt. R. 176; *Beeman v. Buck*, 3 Id. 53; *Carley v. Wilkins*, 6 Barb. S. R. 557; *Tyre v. Causay*, 4 Harring. R. 425; *Hawkins v. Berry*, 5 Gilm. R. 36; *Hilman v. Wilcox*, 30 Maine R. 170; *Ender v. Scott*, 6 Illo. R. 35; *Taymon v. Mitchell et al.*, 1 Md. C. Decs. 496; *Beals v. Olmstead*, 24 Vt. R. 114; in the case of *Towell et al. v. Gatewood*, 2 Scam. R. 22, this distinction was lucidly drawn by Chief Justice Wilson, who says, "Where the representation is positive, and relates to a matter of fact, it constitutes a warranty, as that a ship is an American or French ship, or that a crew consists of so many hands. But where the representation relates to that which is a matter of opinion or fancy, as, for example, the value of a horse or painting, in such case the representation is to be regarded as an expression of opinion, rather than such a verification of a fact as will amount to a warranty, unless that idea is excluded by an express warranty, or such other declaration as leaves no doubt of the intention to make a warranty;" so also, if the affirmation be accompanied with a declaration that the owner would not be afraid to warrant, it amounts to such; *Cook v. Mosely*, 13 Wend. R. 277. Whenever it is doubtful whether a warranty was intended by the parties to a contract, the question is one lying within the province of

in their enjoyment by virtue of the Statute of Limitations (c). By this

(c) Stat. 21 Jac. I. c. 16.

a jury to determine; *Duffee v. Mason*, 8 Cow. R. 25; *Osgood et al. v. Lewis*, 2 Har. & Gill's R. 495; *Whitney v. Sutton*, 11 Wend. R. 411; *Kinley v. Fitzpatrick*, 4 How. (Miss.) R. 59; *Baum v. Stevens*, 2 Ired. R. 411; *Foggart v. Blackweller*, 4 Id. 238; *House v. Firt*, 4 Blackf. R. 293; *McFarland v. Newman*, 9 Wat. R. 55; *Foster v. Caldwell*, 18 Vt. R. 176; *Bradford, &c., v. Bush*, 10 Ala. R. 386; but where the contract is in writing, it must be interpreted by the court; *Osgood et al. v. Lewis*, 2 Har. & Gill's R. 495.

Where a person has purchased an article with the ability or opportunity of inspection, he will be considered as having purchased on his own judgment, and will not be entitled to look to the seller should he be disappointed in the value or quality of the article; *Rose et al. v. Beatie*, 2 N. & McC. R. 538; *McFarland v. Newman*, 9 Wat. R. 55; *Salisbury et al. v. Stainer et als.*, 19 Wend. R. 159; *Barnett v. Stanton*, 2 Ala. R. 195; *Baird v. Matthews*, 6 Dana's R. 129; *Dillard v. Moore*, 2 Eng. R. 166; *Simpson v. Wiggin et al.*, 3 Wood. & Min. R. 413; *Taymon v. Mitchell et al.*, 1 Md. C. Decs. 496; *Calhoun v. Vechis*, 3 Wash. C. C. R. 165; *Curcier et als. v. Pennock*, 14 Serg. & Raw. R. 51; and this is upon the principle, "that the vendee has it in his power to guard against any latent defect, or deception in the article purchased, by exacting a warranty from the vendor; but if, instead of taking this precaution, he will trust to his own sagacity and judgment, he should bear the loss if they deceive him;" *Welsh v. Carter*, 1 Wend. R. 185; but if the seller has acted fraudulently, he will notwithstanding be liable; *Henshaw et als. v. Robbins*, 9 Metc. R. 83; *Hanks v. McKee*, 2 Litt. R. 227; in accordance with the above doctrine, where an article was sold at auction as barilla, and was examined by the purchaser, and a sample exhibited at the sale, and the article turned out to be kelp, it was held, that there was

no warranty; *Swett v. Colgate et als.*, 20 Johns. R. 196; and generally speaking, in executed contracts for the sale of personal property, where there is neither fraud nor express warranty, the purchaser takes the property at his own risk as to its quality and condition; *Moses et als., v. Mead et als.*, 1 Denio's R. 378, S. C., 5 Id. 617; *Ricks, adm'r, v. Dillahunt*, 8 Port. R. 134.

Some of the States hold that a sound price implies a sound commodity; this is the law of North and South Carolina; *Crawford v. Wilson*, 2 Constitution. R. 352; *Whitefield v. McLeod*, 2 Bay's R. 380; *State v. Gaillard et als.*, Id. 19; *Lester v. Exec's of Graham*, 1 Constitutional R. 182; *Timrod v. Shoolbred*, 1 Bay's R. 324; *Barnard v. Yates*, 1 N. & McC. R. 142; *Missroon et al. v. Waldo et al.*, 2 Id. 76; *Rose et al. v. Beatie*, 2 N. & McC. R. 538; *Ashley v. Reeves*, 2 McC. R. 432; *Toris v. Long*, 1 Tayl. R. 17; *Vaughan v. Campbell*, 2 Brev. R. 53; *Furman v. Miller*, Id. 127; but most of the States entirely repudiate this doctrine; *Seixas et al. v. Woods*, 2 Caines' R. 48; *Fleming v. Slocum*, 18 Johns. R. 403; *Johnston v. Cope et al.*, 3 Har. & Johns. R. 89; *Penniman v. Pierson*, Chip. (Vt.) R. 394; *Dean v. Mason*, 4 Conn. R. 428; *Cozzins v. Whitaker*, 3 Stew. & Port. R. 322; *Hart et als. v. Wright*, 17 Wend. R. 267, S. C., 18 Id. 449; *West v. Cunningham*, 9 Port. R. 104; *Mixer et al. v. Coburn*, 11 Metc. R. 559; and in those States where this principle is acknowledged, it is held, that there will not be an implied warranty of soundness, in a case free from fraud, where the purchaser is acquainted with the defect in the article sold; *Britain v. Israel et als.*, 3 Hawks' R. 222; *Miller v. Yarborough*, 1 Rich. R. 48; *Porcher, ads, Caldwell*, 2 McM. R. 329; *Exec's of Hart v. Edwards*, 2 Bail. R. 306; *Williams v. Vance, adm'r, Dudley's L. & Eq. R. 97*; *Lyles v. Bass, Cheeves' L. & Eq. R. 85*; *Venning v. Gault*, Id. 87; *Watson et al., adm'r, v. Boatwright*, 1 Rich. R. 402;

statute all actions of trespass, detinue and replevin for goods or cattle must be brought within *six* years next after the cause of such action

Wood, adm'r, *v. Ashe*, 1 Strobb. R. 407; *Hudgins v. Perry*, 7 Ired. R. 102; of course there can be no implied warranty, from a sound price, where the vendor positively refuses to warrant; *Farr v. Gist*, 1 Rich. R. 68; *McLean v. Green*, 2 McM. R. 17; *Limehouse v. Gray*, 3 Brev. R. 321.

In cases of sales by sample, most of the decisions maintain that the vendor is responsible if the quality of the bulk of the commodity is not equal to the sample shown; *The Oneida Manufacturing Co. v. Laurence et als.*, 4 Cow. R. 440; *Rose et al. v. Beatie*, 2 N. & McC. R. 538; *Galagher et al. v. Waring*, 9 Wend. R. 20; *Moses et als. v. Mead et als.*, 1 Denio's R. 378, S. C., 5 Id. 617; *Magee v. Billingsley*, 3 Ala. R. 679; and this principle has been held to apply even though the purchaser himself takes a sample from the goods; *Beebe v. Robert*, 12 Wend. R. 413; *Boorman v. Jenkins*, Id. 566; *Williams v. Spafford*, 8 Pick. R. 250; but in Pennsylvania, where there is a sale by sample, there is no implied warranty that the quality of the goods shall be the same as the sample, but merely that they shall be the same in species; *Borrekins v. Bevan et al.*, 3 Raw. R. 23; *Jennings et al. v. Gratz*, Id. 168; *Willings et al. v. Consequa*, Pet. C. C. R. 317, S. C., Id. 172; *Carson et al. v. Baillie*, 7 Harris's R. 375; *Fraley v. Bispham*, 10 Barr's R. 320; in the last of which decisions, Judge Coulter says, "If that case" (*Borrekins v. Bevan*) "means any thing, it means this, that when the thing is sold by sample, and without express warranty, the purchaser takes it at his own risk, unless it should prove to be an article different in kind; all gradations in quality are at the hazard of the buyer;" some of the cases, however, seem to hold an intermediate doctrine, deciding that there is an implied warranty that a sample taken in the usual way is a fair specimen of the thing sold; *Sands et al. v. Taylor et al.*, 5 Johns. R. 404; *Hargons v. Stone*, 1 Seld. R. 73;

Bevine et al. v. Dord, 2 Sandf. S. R. 95; and in *Bradford v. Manly*, 13 Mass. R. 139, it was held, that a sale by sample is tantamount to a warranty that the article sold is of the same kind with the sample; but if an opportunity has been given for examination or inspection, it is a strong circumstance to prove that the sale has not been by sample; *Bevine et al. v. Dord*, 2 Sandf. S. R. 89.

In the sale of provisions for domestic use, there is an implied warranty of freshness; *Van Bracklin v. Fonda*, 12 Johns. R. 468; *Moses et als. v. Mead et als.*, 1 Denio's R. 378, S. C., 5 Id. 617; but the circumstances of the sale may be such that there will no implied warranty, as where the vendor equally with the vendee, relies upon the brand of the inspector, or the goods are not sold for consumption; *Emerson v. Brigham*, 10 Mass. R. 197; *Jones v. Murray, &c.*, 3 Mon. R. 83; *Moses et als. v. Mead et als.*, 1 Denio's R. 378; S. C. 5 Id. 617; and generally, wherever articles are sold for a particular use or purpose, there is an implied warranty that they are fit for that purpose; *Brenton v. Davis*, 8 Blackf. R. 89; *Otts v. Alderson*, 10 Smed. & Mar. R. 480; *Singleton's adm'r v. Kennedy*, 9 B. Mon. R. 222; *Beals v. Olmstead*, 24 Vt. R. 114; but where there is no fraud in the seller, neither *suppressio veri* nor *suggestio falsi*, and the purchaser is in possession of all the information necessary to enable him to make a correct estimate of the value of the thing he is about to purchase, or which from its nature would occur to an ordinary observer, the law will not raise an implied warranty on the part of the seller, that it shall answer the purpose for which the purchaser bought it; *Carnochan v. Gould*, 1 Bail. R. 179.

Where a purchase is made without an examination, or an opportunity for it, it seems that there is an implied warranty the thing sold shall be merchantable; *Gal-*

(d); but if the person entitled to any such action be under age, *feme*

(d) Sect. 3.

lagher et al. v. Waring, 9 Wend. R. 20, S. C. 18 Id. 425; Howard et al. v. Hoey, 23 Id. 350; and there may be an implied warranty by custom; but it must be either a general usage, or both plaintiff and defendant must be acquainted with the custom in order to raise the warranty; Stevens v. Smith, 21 Vt. R. 90. Where it is customary to examine an article before shipping it away, it has been held, that the purchaser who neglects to do so admits the quality to be good; Vanderhorst & Co. v. McTaggart, 2 Bay's R. 498. And see Thompson v. Ashton, 14 Johns. R. 316.

In every sale of a note or other negotiable instrument, there is an implied warranty of genuineness; Turner v. Tuttle, 1 Root's R. 350; Jonson v. Titus et al., 2 Hill's R. 606; Herrick v. Whitney et als., 15 Johns. R. 240; Coolidge v. Brigham, 1 Mete. R. 547, S. C. 5 Id. 68; Thrall v. Newall, 19 Vt. R. 203; but in the sale and assignment of a judgment without recourse, it is not warranted that the proceedings are free from error; Glass v. Reed, 2 Dana's R. 168. In the sale of every personal chattel there is an implied warranty of title; Defreeze v. Trumper, 1 Johns. R. 274; Rew v. Barber, 3 Cow. R. 272; Hermance v. Vernoy, 6 Johns. R. 5; Gookin et als., v. Graham et als., 5 Hump. R. 480; Ricks, adm'r, v. Dillahunty, 8 Port. R. 134; Boyd v. Bopst, 1 Dal. R. 91; Chism v. Woods, Hard. R. 231; Forsythe, &c. v. Ellis, 4 J. J. Marsh. R. 298; Lanier v. Auld, adm'r, 1 Murp. R. 138; Moore et al. v. Laugham, 3 Hill's (So. Car.) R. 299; Chancellor v. Wiggins, 4 B. Mon. R. 201; Trigg v. Faris, 5 Hump. R. 343; Charlton v. Lay, Id. 496; McCoy et al. v. Artcher, 3 Barb. S. R. 323; Dorsey v. Jackman, 1 Serg. & Raw. R. 42; Lines v. Smith, 4 Fla. R. 47; and it extends to freedom from prior liens or incumbrances; Dresser v. Ainsworth, 9 Barb. S. R. 619; but where the sale of personal property is by a sheriff, constable, or other judicial officer;

or by an executor, administrator, or other trustee; or if the article sold is not at the time of sale in the possession of the owner, but in that of some third person, there is no implied warranty of title; Morgan v. Fencher, 1 Blackf. R. 10; The Monte Allegre, 9 Wheat. R. 616; Davis v. Murray, 2 Constitutional R. 143; Robinson v. Cooper, 1 Hill's (S. C.) R. 286; Fuller v. Fowler, 1 Bail. R. 75; Ricks, adm'r, v. Dillahunty, 8 Port. R. 134; Forsythe, &c., v. Ellis, 4 J. J. Marsh. R. 298; Hensley v. Baker, 10 Misso. R. 157; McCoy et al. v. Artcher, 3 Barb. S. R. 323; Edick v. Crim, 10 Barb. S. R. 445; Worthy et al. v. Johnson et al., 8 Geo. R. 236; where, however, a judicial officer "steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible;" The Monte Allegre, 9 Wheat. R. 616.

The law of implied warranties extends as well to cases of exchange, as to those of purchase; Rivers v. Crugett, 1 McCord's R. 100.

Where an express warranty has been given, it does not matter whether the seller knew any unsoundness in the chattel sold or not, for in either case he will be responsible; Kimmel v. Lichty, 3 Yeat. R. 262; Smith v. Williams, 1 Car. L. Repos. 263, n.; Ricks, adm'r, v. Dillahunty, 8 Port. R. 134; Beeman v. Buck, 3 Vt. R. 53; Carley v. Wilkins, 6 Barb. S. R. 557; Tyre v. Causay, 4 Harring. R. 425; Bartholomew v. Bushnell, 20 Conn. R. 271; Trice v. Cochran, 8 Gratt. R. 442; such a warranty, however, does not extend to any thing not included within its terms; Porcher, *ads*, Caldwell, 2 McMull. R. 329; Stucky v. Clyburn, Cheeves' L. & Eq. R. 186; Rodrigues, *ads*, Habersham, 1 Spears' R. 314; McLaughlin v. Horton, 1 Hill's (S. C.) R. 383; Wood, adm'r, v. Ashe, 1 Strobbh. R. 407; thus, a warranty of quality is no warranty of value; Lightburn v. Cooper, 1 Dana's R. 274; nor will one of title

covert, non compos mentis, imprisoned or beyond the seas, such person shall be at liberty to bring the same action within *six* years after the disability is removed (e)(1).

(e) Sect. 7.

extend to soundness; *Smith, &c., v. Miller*, 2 Bibb's R. 617; *Wells v. Spears*, 1 McCord's R. 421; *Hughes ads, Banks*, Id. 537; nor will quantity cover quality; *Jones v. Murray, &c.*, 3 Mon. R. 83; *Taymon v. Mitchell et al.*, 1 Md. C. Decs. 496; but in those places where a sound price implies a sound article, an express warranty of title will not exclude an implied warranty of soundness; *Roderigues ads, Habersham*, 1 Spears' R. 314; *Wells v. Spears*, 1 McCord's R. 421; *Wood v. Ashe*, 3 Strobb. R. 64. Even an express warranty will not extend to open and palpable defects; *Schuyler v. Russ*, 2 Caines's R. 202; *Long v. Hicks*, 2 Hump. R. 305; *Caldwell v. Smith*, 4 Dev. & Bat. R. 64; *Stucky v. Clyburn, Cheeves' L. & Eq.* R. 186; *Mulvany v. Rosenberger*, 6 Harris's R. 203; hence a wilful and fraudulent representation by the seller of a fire engine, that it was as good as another designated engine, and a warranty that it would perform as well as any other in the western country, is not to be considered violated, because the warranted engine is inferior to others in the country much larger and more costly, if the inferiority be evident to a common observer; *The President, &c., v. Wadleigh*, 7 Blackf. R. 102; but see *Wilson v. Ferguson, Cheeves' L. & Eq.* R. 190.

In the case of *Otts v. Alderson*, 10 Smed. & Mar. R. 480, Judge Clayton, in speaking of warranties, uses the following language: "On this subject the general rule is, that the purchaser buys at his own peril, *caveat emptor*, unless the seller either give an express warranty, or unless the law imply a warranty from the circumstances of the case, or the nature of the thing sold; or unless the seller be guilty of fraudulent representation or concealment in respect to a material inducement to the sale. No particular form of words is necessary to the creation of a warranty—any

affirmation or representation in relation to the article sold, is sufficient if it be intended to have that effect. There is certainly a tendency in modern cases * * * to extend the doctrine of implied warranty * * * 1st. A warrant is implied, that the seller has title. 2d. That the articles are merchantable, when from their nature or situation at the time of the sale, an examination is impracticable. This rule is most frequently brought into requisition where the seller is a manufacturer. 3d. Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied, that it is reasonably fit and proper for such purpose and use, as far as any article of such kind can be. 4th. A warranty is implied against all latent defects in two cases; first, where the seller knew the buyer did not rely on his own judgment, but on that of the seller, who knew, or might have known the existence of the defects; and, second, where a manufacturer or producer undertakes to furnish articles of his manufacture or produce, in answer to an order. 5th. That goods sold by sample correspond with the sample in quality. Another exception to the rule, that a purchaser ordinarily buys at his own risk, is, where the vendor has been guilty of fraudulent representation or concealment."

(1) The time within which a personal action may be brought, is different in the different States. In Pennsylvania, by an act of the 27th of March, 1713, it is enacted, that "All actions of trespass *quare clausum fregit*, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions

Choses in action, whether legal or equitable, differ from choses in possession in this, that the title to them is endangered rather than strengthened by the Statutes of Limitation. This difference arises [*316] from the nature of *the property. Goods and chattels may exist without any owner; but if there cease to be a person entitled to a debt, the debt itself ceases to exist. The time within which actions or suits may be brought for the recovery of choses in action varies according to the nature of the security. The law on this subject has been rendered somewhat difficult by two different acts of parliament (*f*) varying from each other, each passed the same session of (*f*) Stat. 3 & 4 Will. IV. cc. 27, 42.

of debt, grounded upon any lending or contract, without specialty, all actions of debt for arrearages of rent, except the proprietaries' quit rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the 25th day of April, which shall be in the year of our Lord, 1713, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detainue and replevin, for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within two years next after the cause of such actions or suits, and not after. And the said actions upon the case for words, within one year next after the words spoken, and not after." Purd. Dig., (1853,) p. 539.

In New Hampshire, it is provided, that "Actions for words and for any assault, battery, wounding or imprisonment, shall be brought within two years after the cause of action accrued, and not afterwards. All other personal actions should be brought within six years after the cause of action accrued, and not afterwards. Actions of debt founded upon

any judgment or recognizance, or upon any contract under seal, may be brought within twenty years after the cause of action accrued." N. H. Compil. Stats., p. 461, sects. 3, 4, 5.

In some of the western States, suit upon a promissory note must be brought, at farthest, during the term next after the note becomes due.

For the Statutes of Limitation of Personal Actions of the several States, see Dallam's Dig. of the Ls. of Tex., pp. 158 to 164; New Dig. Ls. of Geo., (1851,) by T. R. R. Cobb, Vol. 1, pp. 561, 562, 564, 566; Thompson's Dig. Ls. of Fla., p. 441, &c.; Code of Va., (1849,) p. 591, &c.; Revis. Stats of N. Y., (3d ed.) Vol. 2, p. 394, &c.; Revis. Stats. of Vt., (1839,) p. 305, &c.; Michi. Revis. Stats., p. 576, &c.; Clay's Ala. Dig., p. 326, &c.; Dorsey's Ls. of Md., Vol. 1, p. 9, &c.; Revis. Stats. of Mass., (1836,) p. 698, &c.; Revis. Stats. of Maine, p. 616, &c.; Revis. Stats. of N. C., (1836-7,) p. 372, &c.; Stats. of N. J., p. 92, &c.; Moorehead & Brown's Dig. of Ky. Stats., p. 1132, &c.; Stats. of S. C., Vol. 2, p. 585, &c.; Caruthers & Nicholson's Stat. Ls. of Tenn., p. 439, &c.; Ls. of Dela. Revis. Code, (1852,) p. 440, &c.; Dig. of the Stats. of Ark., p. 696, &c.; How. & Hutch. Stat. Ls. of Missi., p. 569, &c.; Stats. of O., (1841,) p. 554, &c.; Revis. Stats. of Miss., (1845,) p. 716, &c.; An act of the Legislature of California, entitled "An Act defining the time for commencing Civil Actions," approved April 10, 1850.

parliament, and each intended to amend the law. The following, however, appear to be the distinctions. If the chose in action be money secured by any mortgage, judgment (*g*) or lien, or otherwise charged upon or payable out of any real estate at law or in equity, or any legacy (*h*), no action or suit can be brought to recover the same but within *twenty years* next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent (*i*), to the person entitled thereto or his agent (*j*); and in such case no such action or suit shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given (*k*). If the chose in action be rent due upon an indenture of demise, or money secured by bond or other specialty, or by a recognizance, an action must also be brought within *twenty years* after the cause of such action (*l*), or within twenty years after the removal *of any of the disabilities [**317*] of infancy, coverture, lunacy or absence beyond seas (*m*). And if any person against whom there is any such cause of action shall be beyond the seas at the time of such cause of action accrued, the person entitled to any such cause of action may bring the same against him within twenty years after his return (*n*). And if any acknowledgment shall have been made, either by writing signed by the party liable, or his agent, or by part payment or part satisfaction on account of any principal or interest then due, the person entitled may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment, or within twenty years after any of the above-mentioned disabilities shall have ceased, or the party liable shall have returned beyond the seas, as the case may be (*o*). If the chose in action consist of arrears of dower,

(*g*) *Watson v. Birch*, 15 Sim. 523.

(*h*) *Sheppard v. Duke*, 9 Sim. 567.

(*i*) *Lord St. John v. Boughton*, 9 Sim. 219.

(*j*) *Blair v. Nugent*, 3 Jones & Lat. 673, 677.

(*k*) Stat. 3 & 4 Will. IV. c. 27, s. 40.

(*l*) Stat. 3 & 4 Will. IV. c. 42, s. 3.

(*m*) Sect. 4.

(*n*) *Ibid*.

(*o*) Sect. 5; *Kempe v. Gibbon*, 9 Q. B. 609.*

neither such arrears nor damages on account thereof can be recovered or obtained by any action or suit for a longer period than *six years* next before the commencement of such action or suit (*p*). Arrears of rent or of interest in respect of any sum of money charged upon or payable out of any real estate or in respect of any legacy, can be recovered only within *six years* next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (*q*). But if such arrears are secured to the claimant (*r*) by indenture of demise (*s*), [*318] or by bond *or other specialty (*t*), an action of debt or covenant may be brought for such arrears at any time within twenty years. And where a mortgagee or other incumbrancer shall have been in possession of any real estate within one year next before the action or suit of a subsequent mortgagee or incumbrancer, the latter may recover the arrears of interest which may have become due to him during the whole time that the prior mortgagee or incumbrancer was in possession (*u*). If the chose in action consist of a simple contract debt, it must be sued for within *six years* next after the cause of action, or within *six years* next after the removal of any of the disabilities of infancy, coverture, lunacy, imprisonment or absence beyond seas (*v*). And no acknowledgment or promise by words only to pay such debt shall be deemed sufficient evidence of a new or continuing contract to take the case out of the operation of the statute, unless such acknowledgment or promise shall be made in writing, signed by the party chargeable thereby (*x*)(1). Actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, must also be brought within *six years* after the cause of action, with a similar saving in respect of disabilities to that applica-

(*p*) Stat. 3 & 4 Will. IV. c. 27, s. 41.

(*q*) Stat. 3 & 4 Will. IV. c. 27, s. 42; *Hodges v. Croyden Canal Company*, 3 Beav. 86; *Francis v. Grover*, 5 Hare, 39; *Humfrey v. Gery*, 7 C. B. 567.*

(*r*) *Hughes v. Kelly*, 3 Dru. & Warren, 482.

(*s*) *Paget v. Foley*, 2 New Ca. 679.*

(*t*) *Sims v. Thomas*, 12 Ad. & Ell. 536; * *Hunter v. Nockolds*, 1 Mac. & Gord. 640.

(*u*) Stat. 3 & 4 Will. IV. c. 27, s. 42.

(*v*) Stat. 21 Jac. I. c. 16, ss. 3, 7. As to death abroad, see *Townsend v. Deacon*, 3 Exch. Rep. 706.*

(*x*) Stat. 9 Geo. IV. c. 14, s. 1; see ante, pp. 69, 74.

(1) See ante, pp. 69, 74, notes.

ble in the case of actions on indentures of demise, bonds or other specialties (*y*). And actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force, must be brought within *two years* after the cause of such actions, with the like saving in respect of disabilities, *unless the time [319] for bringing such action is or shall be by any statute specially limited (*z*).

When a cause of action accrues to a person in his lifetime, the time limited by the Statutes of Limitation will run on after his decease from the period that the cause of action accrued, and will not be reckoned from the time that administration was taken out to his effects (*a*). But if the cause of action accrue after the death of the party, the time limited by the statute will run only from the grant of the letters of administration (*b*). On the other hand, the death of the debtor and the absence of any personal representative to his effects, will not prevent the time limited by the statute from continuing to run on. For if there be once a cause of action, a plaintiff that can sue, and a defendant that can be sued in England, the time limited by the statute will begin to run, and will not be stopped by the decease of either party (*c*). An executor or administrator is not however, bound to plead the Statute of Limitations to any debt or demand, but may, if he please, pay the same, notwithstanding the time limited by the statute may have expired (*d*)(1). But if the estate be administered in

(*y*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4; see ante, p. 316.

(*z*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4.

(*a*) 2 Wms. Saund. 63 k.

(*b*) *Murray v. East India Company*, 5 Barn. & Ald. 204; * *Perry v. Jenkins*, 1 Mylne & Cr. 118.

(*c*) *Rhodes v. Smethurst*, 6 Mee. & Wels. 351; *Freaker v. Cranefeldt*, 3 Mylne & Cr. 499.

(*d*) *Norton v. Frecker*, 1 Atk. 526; *Ex parte Dewdney*, 15 Ves. 498.

(1) An executor or administrator is not bound to interpose the general statute of limitations, in bar of the recovery of a demand against the estate, which is otherwise well founded; *Hodgon, adm'r, v. White et al.*, 11 N. H. R. 108; *Leigh, adm'r, v. Smith et al.*, 3 Ired. E. R. 442; *Walter v. Radcliffe, adm'r, et al.*, 2 Desauss. R. 577; *Kennedy's Appeal*, 4 Barr's R. 149; *Brown et al., adm'rs, v. Porter*, 7 Hump. R. 373; nor can the legatees or creditors of the decedent require them to do so; In the matter of *Smith*, 1 Ash. R. 352; *Leigh, adm'r, v. Smith et al.*, 3 Ired. E. R. 442; but the court will not allow a sale of the real estate of the testator or intestate, for the purpose of paying a debt barred by the statute; *The Heirs of Bond, v. Smith, adm'r*, 2 Ala. R. 660. Where, however, for the more speedy settlement of the estates of decedents, statutes have been passed, enacting, that all claims not

the Court of Chancery, any party to the suit is competent to take the objection, although the executor may not have insisted on it (*e*).

Notwithstanding the period of six years limited for the payment of [*320] simple contract debts, the debtor may, *by charging his real estate by his will with the payment of his debts, prevent the operation of the statute on all such debts as have not been barred by the statute in his lifetime (*f*). Real estate, it will be remembered, was not formerly liable to the payment of any debts which were not secured by specialty binding the heirs (*g*); and the alteration, which in this respect has been made in the law, affects only such real estates as have not been charged by the deceased with the payment of his debts. The creditors therefore in whose favour the charge is made acquire, as before the alteration, the character of *cestui que trusts*; and in equity they will not be allowed to lose their debts, because they do not go to law to enforce payment when they have a trustee to pay them (*h*). But as personal estate has always been primarily liable to the payment of

(*e*) *Shewen v. Vanderhorst*, 1 Russ. & M. 347; 2 Russ. & M. 75.

(*f*) *Burke v. Jones*, 2 Ves. & Beames, 275; *Hughes v. Wynne*, Turn. & Russ. 307; *Crallan v. Oulton*, 3 Beav. 1.

(*g*) See *Principles of the Law of Real Property*, 57, 1st ed.; 61, 2d ed.; 64, 3d ed.; ante, p. 97.

(*h*) Turn. & Russ. 309.

presented within a certain time after his death, shall be barred, it is the duty of the executor or administrator to plead the statute; *Hodgon, adm'r, v. White et al.*, 11 N. H. R. 208; *Brown v. Anderson*, 13 Mass. R. 301; *Thompson v. Brown*, 16 Id. 172; *Emerson v. Thompson*, Id. 429; *Heath v. Wells*, 5 Pick. R. 140; *Tunstall et al. v. Pollard's adm'r*, 11 Leigh's R. 2; *Brown et al., adm'rs, v. Porter*, 7 Hump. R. 373.

Whether one administrator may charge the estate by refusing to plead the statute of limitations, although his co-administrator insist on pleading it, is doubted; but if one of the administrators stand neutral, the other may plead the statute; *Scull et al., adm'rs, v. Exec's of Wallace*, 15 Serg. & Raw. R. 231.

In the case of *Smith v. Porter et als., exec's*, 1 Bin. R. 209, Chief Justice Tilghman, in deciding that a debt which is

barred by the act of limitations, is not revived by a clause in a will ordering all the testator's just debts to be paid, says, "Whether the debts are just or not must be left to the judgment of the executor before he makes a voluntary payment; and if upon a candid examination he thinks a debt not justly due, it would be doing violence to the words of the testator, so to construe them, as to deprive the executor of the legal means of defence by pleading the act of limitations. But an executor ought not to plead that act against a just debt; on the contrary, if he knows it to be just, I think it is as dishonest in him to use that plea, as it would be in the case of his own debt." But since the decision of *Lewis, J.*, in *Kittera's Estate*, 5 Harris' R. 423, prudence would suggest to an administrator or executor, the propriety of pleading the statute, whenever applicable.

all debts, a trust created by a testator for the payment of his debts out of his personal estate will not prevent the operation of the statute (*i*).

When the dividends upon any stock transferable at the Bank of England have not been claimed for ten years, such stock, together with the unclaimed dividends, is transferred to the account of the commissioners for the reduction of the national debt (*k*); and such dividends, together with all the future dividends on the stock, are invested by the commissioners in the purchase of like stock so as to accumulate (*l*). And the governor or deputy governor of the bank for the time [*321] being may order the transfer of such stock and the payment of the dividends to any person showing, to his satisfaction, a right thereto; but in case such governor or deputy governor shall not be satisfied of the justice or legality of the claim, an order for transfer and payment may be obtained from the Court of Chancery by petition in a summary way stating and verifying the claim (*m*). But no such transfer of stock or payment of dividends, exceeding the sum of 20*l*., can be made until three calendar months after the application, nor until notice has been advertised in one or more newspapers circulating in London and elsewhere, as the governor and company of the bank shall think fit; which notice must state the name, description and condition of the person in whose name the unclaimed stock or dividends stood when transferred to the commissioners, and the amount thereof, and the name of the claimant, and the time at which the retransfer or payment will be made if no other claimant shall sooner appear and make out his claim. And when the stock or dividends are directed to be transferred or paid by any order of the Court of Chancery, the notice must also state the purport or effect of such order (*n*); and any person may at any time before the actual retransfer of the stock, or payment of the dividends to any such claimant, apply to the Court of Chancery by motion or petition to rescind, alter, or vary any order made for such transfer or payment (*o*).

When a chose in action, whether legal or equitable, is transferred from one person to another, notice of the assignment should be given

(*i*) *Scott v. Jones*, 4 Cl. & Fin. 382; *Freake v. Cranefeldt*, 3 My. & Cr. 499.

(*k*) Stat. 56 Geo. III. c. 60; 8 & 9 Vict. c. 62.

(*l*) Stat. 56 Geo. III. c. 60, s. 4.

(*m*) Sect. 5; *Ex parte Ram*, 3 My. & Craig. 25; *Hunt v. Peacock*, 6 Hare, 361.

(*n*) Stat. 8 & 9 Vict. c. 62, s. 2.

(*o*) Sect. 3.

by the transferee to the person liable to the action at law or suit in equity, the *right to bring which is the subject of the transfer (p). Thus if a debt be assigned, notice of the assignment should be given to the debtor (1). If the subject of the assignment be the right to stock standing in the name of a trustee, notice of the assignment should be given to such trustee. Until such notice be given, it is evident that the debtor may innocently pay the debt, or

(p) *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1.

(1) An assignment of a chose in action is valid, in equity, if made upon a good consideration, and with notice to the debtor; *Adm'r of Sheftall v. Adm'r of Clay*, Charl. R. 230; *Anderson et als. v. Van Allen*, 12 Johns. R. 343; *Briggs v. Dorr*, 19 Id. 95; *Van Vechten v. Graves*, 4 Id. 403; *Littlefield v. Story*, 3 Id. 425; *Wardell v. Eden*, 2 Johns. Cas. 121; *Henry v. Milham*, 1 Green's R. 266; *Perkins v. Parker*, 1 Mass. R. 117; *Corser v. Craig*, 1 Wash. C. C. R. 421; but the debtor should have notice of the transfer; *Wood v. Partridge*, 11 Mass. R. 491; *Foster v. Sinkler*, 4 Id. 450; *Comstock v. Farnum*, 2 Id. 97; *Davenport v. Woodbridge*, 8 Greenlf. R. 18; for, as was said in the latter case, "although upon the assignment the original creditor ceases to be, for any beneficial purpose, the owner of the demand, and cannot receive it, or any part of it, to his own use; yet if the debtor, ignorant of such assignment, make payments to him, they are to be allowed in his favour. And this qualification of the right of the assignee is for the equitable protection of the debtor. But if the latter has notice of the assignment, what he afterwards pays to the original debtor, he pays in his own wrong;" and notwithstanding such payments, he will still be liable to the assignee; *Stevens v. Stevens*, 1 Ash. R. 190; *Jones v. Whitter*, 13 Mass. R. 307; *Jenkins v. Brewster*, 14 Id. 291; *Littlefield v. Story*, 3 Johns. R. 425; *Clark v. Rogers*, 2 Greenlf. R. 143; *Swett v. Green*, 4 Id. 384; *Holland v. Dale*, Minor's R. 265; and so also, if after an assignment with

notice, the original creditor execute a release, the claim is not thereby extinguished; *Welsh v. Mandeville*, 1 Wheat. R. 236, S. C., 5 Id. 277; *Cowan v. Shields*, 1 Overt. R. 314; *Dunn v. Snell*, 15 Mass. R. 485; *Raymond v. Squire*, 11 Johns. R. 47; *Andrews v. Beecker*, 1 Johns. Cas. 411; *Strong v. Strong*, 2 Aik. R. 373; *Eastman v. Wright*, 6 Pick. R. 316; *Wheeler v. Wheeler*, 9 Cow. R. 34.

Actual notice, however, of a transfer is not necessary, for if a party acts in the face of facts and circumstances which were sufficient to put him upon inquiry, he acts contrary to good faith and on his peril; *Anderson et als. v. Van Allen*, 12 Johns. R. 343; as was said in the case of *Johnson v. Bloodgood*, 1 Johns. Cas. 53, "The notice by which parties are affected, is either express or implied; under the head of implied notice, it has been held in a court of equity, 'that whatever is sufficient to put the party upon inquiry is good notice.'" But between the parties to the contract the assignment will be good without notice, either express or implied; *Bishop v. Holcombe*, 10 Conn. R. 444.

At law where an assignment of a chose in action has been made, the claim should generally be sued in the name of the assignor; *Adm'r of Sheftall v. Adm'r of Clay*, Charl. R. 230; *Boylston v. Greene*, 8 Mass. R. 465; but where the party who is bound has recognized the transfer, and promised to pay the new creditor, he may bring suit in his own name; *Mowry v. Todd*, 12 Johns. R. 281; *Tiernan et al. v. Jackson*, 5 Pet. R. 597.

the trustee transfer the stock to the transferor; or the transferor may fraudulently transfer his right over again to a third person. The transferee, therefore, until he has given notice to the party liable, has not done all that lies in his power to perfect his title. The chose in action still remains the apparent property of the transferor, and in the event of his bankruptcy will pass to his assignees as property in his order and disposition, with the consent of the true owner thereof (*q*). The importance of giving notice suggests the precaution that every person about to accept an assignment of a chose in action, should inquire of the person liable to the action or suit, whether he has had notice of any prior assignment. And if there be two or more persons liable, inquiry should be made of every one of them; for notice by a prior assignee to any one of them would be equivalent to notice to all (*r*). It is also advisable that a written answer, should be obtained to every such inquiry, in order that if the assignee should be misled by a false answer, he may be enabled to recover damages for the misrepresentation. For it has been doubted whether the answer to such an inquiry be not a representation concerning the ability of the intended assignor within the meaning of Lord Tenterden's Act, which *requires that all such representations be made in writing, [*323] signed by the party to be charged therewith (*s*). The inquiry, however, thus recommended will not of itself strengthen the title of the assignee, further than by assuring him that no previous assignment has been made. In order to obtain a good title, he must himself give notice to the person or to one of the persons liable to the debt or demand assigned to him. When this has been done his title will be secure, and will prevail over that of any unknown prior assignee who may have omitted to give such notice (*t*). If the property consist of money or stock standing in the name of the accountant-general of the Court of Chancery, or of securities in his possession (*u*), an order of the court should be obtained on petition (*x*), restraining transfer or payment without notice to the assignee. This order is called a stop order, and

(*q*) *Ex parte* *Monro*, Buck, 300; *Williams v. Thorpe*, 2 Sim. 257; *Thompson v. Spiers*, 13 Sim. 469; see ante, p. 48.

(*r*) *Smith v. Smith*, 2 Cr. & M. 231; **Meux v. Bell*, 1 Hare, 73, 87.

(*s*) *Lyde v. Barnard*, 1 Mees. & Wels. 101; **Swann & Phillips*, 8 Ad. & El. 457; * see ante, p. 75.

(*t*) *Dearle v. Hall*, *Loveridge v. Cooper*, 1 Russ. 1.

(*u*) *Williams v. Symonds*, 9 Beav. 523.

(*x*) To be served only on the parties interested in the fund assigned; General Order 3d April, 1841; *Glazbrook v. Gillatt*. 9 Beav. 611.

will have the same effect as notice of assignment given to any private debtor (*y*). If the property be stock standing in the name of a trustee, who has died without any administration having been taken out to his effects, a *distringas* obtained by the assignee to restrain the transfer of the stock will confer on him the same priority as notice to the trustee would have done had he been living (*z*). When the property consists of a policy of assurance, or of shares in a joint stock company, notice of the transfer should be given to the office of the company (*a*) (1).

[*324] *The title to personal property sometimes depends upon deeds, wills, or other documents of title of the like nature, and cannot be shown without their production. Thus a reversionary interest in money in the funds, settled by deed or will, may be mortgaged and sold again and again before it becomes an interest in possession. In these cases the purchaser is entitled to an abstract of the deeds, wills, &c., which compose the title, in the same manner as if the subject of the contract had been real estate; and the original deeds and the probates or office copies of the wills, must also in like manner be produced for the verification of the abstract (*b*). The purchaser is also entitled either to the possession of the deeds, or, if this cannot be had, to attested copies of them, and a covenant for their production, at the expense of the vendor (*c*). And when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into under the like circumstances by the grantor of real estate (*d*).

(*y*) *Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Beav. 463.

(*z*) *Etty v. Bridges*, 2 Younge & Coll. N. C. 486; see ante, p. 161.

(*a*) *Williams v. Thorpe*, 2 Sim. 257; *Thompson v. Spiers*, 13 Sim. 469; *West v. Reid*, 2 Hare, 249; *Martin v. Sedgwick*, 9 Beav. 333; *Powless v. Page*, 3 C. B. 16.*

(*b*) See *Principles of the Law of Real Property*, 349, 1st ed.; 351, 2d ed.; 364, 3d ed., *Hobson v. Bell*, 2 Beav. 17.

(*c*) *Ibid.* 354, 356, 1st ed.; 356, 358, 2d ed.; 369, 372, 3d ed.

(*d*) *Ibid.* 348, 1st ed.; 349, 2d ed.; 362, 3d ed.

(1) Almost every policy of insurance companies, after the time limited for contains a stipulations, that in case of an assignment, it shall be approved by the company, within a certain specified time after such transfer, and that in default of such approval, the policy shall, *ipso facto*, become null and void; but in practice, assignments are approved by insurance companies, after the time limited for notice has expired, in cases which are free from suspicion of fraud or unfair dealing; and when so approved, the companies waive all benefit which they might have taken from the want of notice within the time required by the policy.

The vendor of shares in a joint stock company is bound merely to give such evidence of the constitution of the company, as to show that the proposed transfer will give a valid title to the shares sold (*e*).

From what has been said it will appear that the title to personal property is far more simple than that to real estate. And amongst the plans which have appeared *for the amendment of the law, [*325] has been one for adapting the machinery of the funds to the transfer of landed property. Upon consideration, however, it will perhaps appear that the greater complexity of the title to lands arises partly from the nature of the property, and partly from the more full power of disposition to which lands are subject. Lands, unlike stock, may be converted from arable to pasture, may be cut up into roads, canals, or railways, may be sold by the foot for building purposes, may be let upon lease for terms absolute or determinable, may be held for life, or in tail, as well as in fee, and may be disposed of by contingent remainders, shifting uses, and executory devises, without the intervention of any trustees. Personal property, on the contrary, cannot be settled without the intervention of trustees in whom a great degree of personal confidence must necessarily be placed; but when so settled, the title to it is sometimes as long and intricate as that to real estate. If the nature of lands could be altered, or if landowners were willing, in order to save themselves expense, to give up some of their powers of disposition, the title to real estate might doubtless be rendered as simple as that to personal property. To the latter alternative, however, few, if any, would be inclined to submit. Whilst, therefore, much might be done to simplify and improve our laws of property by an assimilation of the rules of real and personal estate, where the history of each forms the only ground of variety, care should be taken to preserve untouched such distinctions as are founded on the broad basis of a practical difference.

(*e*) *Curling v. Flight*, 2 Phil. 613.



*APPENDIX (A).

[*327]

(Referred to p. 187.)

FORM OF LETTERS PATENT.

VICTORIA by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith to all to whom these presents shall come greeting WHEREAS A. B. of —— hath by his petition humbly represented unto us that he is in possession of an invention for —— which the petitioner conceives will be of great public utility. That he is the true and first inventor thereof and the same is not in use by any other person or persons to the best of his knowledge and belief the petitioner therefore most humbly prayed that we would be graciously pleased to grant unto him his executors administrators and assigns our royal letters patent for the sole use benefit and advantage of his said invention within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man [COLONIES TO BE MENTIONED IF ANY] for the term of fourteen years pursuant to the statutes in that case made and provided [AND WHEREAS the said A. B. hath particularly described and ascertained the nature of the said invention and in what manner the same is to be performed by an instrument in writing under his hand and seal and has caused the same to be duly filed in ——:] AND WE being willing to give encouragement to all arts and inventions which may be for the public good are graciously pleased to condescend to the petitioner's request KNOW ye therefore that we of our especial grace certain knowledge and mere motion have given and granted and by these presents for us our heirs and successors do give and grant unto the said A. B. his executors administrators and assigns our especial licence full power sole privilege and authority that he the said A. B. his executors administrators and assigns and every of them by himself *and themselves or by his or their deputy or [*328] deputies servants or agents or such others as he the said A. B. his executors administrators or assigns shall at any time agree with and no others from time to time and at all times hereafter during the term of years herein expressed shall and lawfully may make use exercise and vend his said invention within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man (a) in such a manner as to him the said A. B. his executors administrators and assigns or any of them shall in his or their discretion seem meet and that he the said A B his executors administrators and assigns shall and lawfully may have and enjoy the whole profit benefit

(a) The Colonies should here be mentioned, if any, though it is not so stated in the printed form annexed to the Act.

commodity and advantage from time to time coming growing accruing and arising by reason of the said invention for and during the term of years herein mentioned TO HAVE HOLD exercise and enjoy the said licenses powers privileges and advantages hereinbefore granted or mentioned to be granted unto the said A. B. his executors administrators and assigns for and during and unto the full end and term of fourteen years from the — day of — A. D. — next and immediately ensuing according to the statute in such case made and provided And to the end that he the said A. B. his executors administrators and assigns and every of them may have and enjoy the full benefit and the sole use and exercise of the said invention according to our gracious intention hereinbefore declared We do by these presents for us our heirs and successors require and strictly command all and every person and persons bodies politic and corporate and all other our subjects whatsoever of what estate quality degree name or condition so ever they be within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man [COLONIES TO BE MENTIONED IF ANY] that neither they or any of them at any time during the continuance of the said term of fourteen years hereby granted either directly or indirectly do make use or put in practice the said invention or any part of the same so attained unto by the said A. B. as aforesaid nor in anywise counterfeit imitate or resemble the same nor shall make or cause to be made any addition *thereunto or subtraction from the same whereby [*329] to pretend himself or themselves the inventor or inventors devisors or devisors thereof without the consent license or agreement of the said A. B. his executors administrators or assigns in writing under his or their hands and seals first had and obtained in that behalf upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command and further to be answerable to the said A. B. his executors administrators and assigns according to law for his and their damages thereby occasioned And moreover we do by these presents for us our heirs and successors will and command all and singular the justices of the peace mayors sheriffs bailiffs constables head-boroughs and all other officers and ministers whatsoever of us our heirs and successors for the time being that they or any of them do not nor shall at any time during the said term hereby granted in anywise molest trouble or hinder the said A. B. his executors administrators or assigns or any of them or his or their deputies servants or agents in or about the due and lawful use or exercise of the aforesaid invention or anything relating thereto PROVIDED ALWAYS and these our letters patent are and shall be upon this condition that if at any time during the said term hereby granted it shall be made appear to us our heirs or successors or any six or more of our or their Privy Council that this our grant is contrary to law or prejudicial or inconvenient to our subjects in general or that the said invention is not a new invention as to the public use and exercise hereof or that the said A. B. is not the true and first inventor thereof within

this realm as aforesaid these our letters patent shall forthwith cease determine and be utterly void to all intents and purposes anything herein contained to the contrary thereof in anywise notwithstanding PROVIDED ALSO and these our letters patent or anything herein contained shall not extend or be construed to extend to give privilege unto the said A. B. his executors administrators or assigns or any of them to use or imitate any invention or work whatsoever which hath heretofore been found out or invented by any other of our subjects whatsoever and publicly used or exercised unto whom our like letters patent or privileges have been already granted for the sole use exercise and benefit *thereof it being our will and pleasure that the said A. B. [*330] his executors administrators and assigns and all and every other person and persons to whom like letters patent or privileges have been already granted as aforesaid shall distinctly use and practise their several inventions by them invented and found out according to the true intent and meaning of the same respective letters patent and of these presents PROVIDED LIKEWISE nevertheless and these our letters patent are upon this express condition [that if the said A. B. shall not particularly describe and ascertain the nature of his said invention and in what manner the same is to be performed by an instrument in writing under his hand and seal and cause the same to be filed in — within — calendar months next and immediately after the date of these our letters patent] [and also if the said instrument in writing filed as aforesaid does not particularly describe and ascertain the nature of the said invention and in what manner the same is to be performed] and also if the said A. B. his executors administrators or assigns shall not pay or cause to be paid at the office of our Commissioners of Patents for Inventions the sums following that is to say the sum of — pounds on or before the — day of — A. D. — and the stamp duty payable in respect of the certificate of such payment and the sum of — pounds on or before the — day of — A. D. — and the stamp duty payable in respect of the certificate of such payment AND ALSO if the said A. B. his executors administrators or assigns shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required in such manner at such times and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or commissioners requiring the same that then and in any of the said cases these our letters patent and all liberties and advantages whatsoever hereby granted shall utterly cease determine and become void anything hereinbefore contained to the contrary thereof in anywise notwithstanding PROVIDED THAT nothing herein contained shall prevent the granting of licenses in such manner and for such *consideration as they may by law be granted AND LASTLY we [*331] do by these presents for us our heirs and successors grant unto the said A. B. his executors administrators and assigns that these our letters

patent or the filing thereof shall be in and by all things good firm valid sufficient and effectual in the law according to the true intent and meaning thereof and shall be taken construed and adjudged in the most favourable and beneficial sense for the best advantage of the said A. B. his executors administrators and assigns as well in all our Courts of Record as elsewhere and by all and singular the officers and ministers whatsoever of us our heirs and successors in our United Kingdom of Great Britain and Ireland the Channel Islands and the Isle of Man [COLONIES TO BE MENTIONED IF ANY] and amongst all and every the subjects of us our heirs and successors whatsoever and wheresoever notwithstanding the not full and certain describing the nature or quality of the said invention or of the materials thereunto conducing and belonging. In witness whereof we have caused these our letters to be made patent this —— day of —— A. D. —— and to be sealed and bear date as of the said —— day of —— A. D. —— in the —— year of our reign.

*APPENDIX (B).

[*332]

(Referred to pp. 202, 221, 223, 226, 303, 305.)

MARRIAGE SETTLEMENT OF A SHARE OF A TESTATOR'S RESIDUARY PERSONAL ESTATE AND OF MONEY IN THE FUNDS UPON THE USUAL TRUSTS.

THIS INDENTURE made the —— day of —— 1848 Between Charles Catchpole of King Street in the city of London gentleman of the first part Grace Gurney of Harley Street in the county of Middlesex spinster of the second part and Henry Hunter of Brixton in the county of Surrey Esquire John James of Lincoln's Inn in the county of Middlesex Esquire and Leonard Lambert of Brighton in the county of Sussex Esquire of the third part WHEREAS a marriage has been agreed upon and is intended to be shortly solemnized between the said Charles Catchpole and Grace Gurney AND WHEREAS under and by virtue of the last will and testament of John Gurney late of Harley Street aforesaid Esquire deceased which said will bears date on or about the ninth day of January 1840 and was proved in the Prerogative Court of the Archbishop of Canterbury (a) on or about the twelfth day of March 1840 the said Grace Gurney is now entitled to one equal undivided fourth part or share or some other part or share of the residuary personal estate of the said testator or the stocks funds or securities in or upon which the same is or may be invested AND WHEREAS the said Grace Gurney is possessed of the sum of £5000 £3 per cent. consolidated bank annuities which said sum was lately standing in her own name in the books of the governor and company of the Bank of England AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said Grace Gurney should assign the said one equal undivided fourth part or *share or other part or share to which she is entitled as aforesaid of and in the residuary personal estate of her said late father unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same And it was also agreed that the said Grace Gurney should transfer the said sum of £5000 £3 per cent. consolidated bank annuities of which she is possessed as aforesaid into the names of the said Henry Hunter John James and Leonard Lambert to be held by them upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same AND WHEREAS the said sum of £5000 £3 per cent. consolidated bank annuities hath been accordingly transferred by the said Grace Gurney out of her name into the names of the said Henry Hunter John James and Leonard

(a) See ante, p. 259.

Lambert and the same is now standing in their names in the books of the governor and company of the Bank of England as they the said Henry Hunter John James and Leonard Lambert do hereby admit and acknowledge Now THIS INDENTURE WITNESSETH that in pursuance of the said agreement in his behalf and in consideration of the said intended marriage she the said Grace Gurney with the consent and approbation of the said Charles Catchpole testified by his being a party to and executing these presents HATH granted bargained sold assigned and transferred and by these presents DOth grant bargain sell assign and transfer unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns ALL that the one equal undivided fourth part or share or other part or share of her the said Grace Gurney under the hereinbefore mentioned will of her said late Father John Gurney of and in the residuary personal estate of her said late father and of and in the stocks funds and securities in or upon which the same now is or shall or may at any time or times hereafter be invested and of and in the dividends interests and annual produce thereof AND all the right title claim and demand whatsoever at law and in equity of her the said Grace Gurney in and to the said one equal undivided fourth part or share or other part or share hereby assigned TO HAVE HOLD RECEIVE AND TAKE the said

[*334] *one equal undivided fourth part or share or other part or share intended to be hereby assigned of and in the residuary personal estate of the said John Gurney and the investments and income thereof unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns IN TRUST for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage and from and immediately after the solemnization thereof Upon and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same AND the said Charles Catchpole and Grace Gurney do and each of them doth hereby irrevocably nominate and appoint the said Henry Hunter John James and Leonard Lambert and the survivors and survivor of them his executors administrators and assigns to be the true and lawful attornies and attorney of them the said Charles Catchpole and Grace Gurney and each of them (b) in their his or her names or name to ask recover and receive from the executors of the will of the said John Gurney and all and every persons and person liable to pay or transfer the same the said one equal undivided fourth part or share hereby assigned and to give effectual discharges for the same and on non-payment or non-transfer thereof or of any part thereof to commence carry on and prosecute any action or actions suit or suits or other proceedings whatsoever for obtaining payment or transfer thereof And also for all or any of the said purposes from time to time to substitute

(b) This power of attorney is not absolutely necessary, as the *choses in action* which are assigned are equitable only; see *ante*, p. 107.

or appoint any attorney or attornies under them or him And generally to do and execute all such other matters and things in the premises as shall be necessary they the said Charles Catchpole and Grace Gurney hereby agreeing to allow and confirm whatsoever the said Henry Hunter John James and Leonard Lambert or the survivors or survivor of them his executors administrators or assigns shall lawfully do or cause to be done in the premises by virtue hereof AND it is hereby agreed and declared by and between the said parties hereto that they the said Henry Hunter John James and Leonard Lambert their executors *administrators and assigns shall stand [*335] possessed of and interested in the said sum of £5000 £3 per cent. consolidated bank annuities so transferred into their names as aforesaid IN TRUST for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage And from and immediately after the solemnization thereof UPON and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and contained of and concerning the same And it is hereby agreed and declared by and between the said parties hereto that from and after the solemnization of the said intended marriage the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns shall stand possessed of and interested in the said one equal fourth part or share or other part or share hereinbefore assigned of and in the residuary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities UPON TRUST that the said trustees or the trustees or trustee for the time being of these presents do and shall either continue the same respectively in their respective actual states of investment or do and shall lay out and invest the same in any of the parliamentary stocks or public funds of Great Britain or at interest upon government or real securities in England or Wales but not in Ireland (c) and do and shall from time to time alter and vary the said stocks funds and securities for or into others of a like nature as often as the said trustees or trustee shall think fit PROVIDED that every such investment alteration and variation be made with the consent of the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them with the consent of the survivor of them (d) and after the decease of such survivor at the discretion of the said trustees or trustee for the time being of these presents AND it is hereby agreed and declared by and between the said parties hereto that after the solemnization of the said intended marriage the said trustees or trustee for the time being of these presents shall stand possessed of and interested in the said *share of the resi- [*336] duary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities and

(c) See ante, pp. 219, 220.

(d) See ante, p. 220.

the stocks funds and securities in or upon which the same may be invested and the dividends interest and annual produce thereof UPON and for the trusts intents and purposes and under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same that is to say UPON TRUST that they the said trustees or trustee for the time being of these presents do and shall during the life of the said Grace Gurney pay the interest dividends and annual produce thereof unto such person or persons as the said Grace Gurney shall from time to time notwithstanding her said intended or any future coverture appoint by any writing under her hand but not by any mode of anticipation and in default of such appointment into her own hands for her sole and separate use (e) exclusive of the said Charles Catchpole and of any future husband but so that she shall not dispose thereof in any mode of anticipation And the receipts in writing of the said Grace Gurney or of such person or persons as she shall appoint to receive the said dividends interest and annual produce in manner aforesaid but not in any mode of anticipation shall notwithstanding her said intended or any future coverture be effectual discharges for the same AND from and immediately after the decease of the said Grace Gurney UPON TRUST that the said trustees or trustee for the time being of these presents do and shall pay the dividends interest and annual produce of the said trust monies stocks funds and securities unto or permit the same to be received by the said Charles Catchpole and his assigns for and during the term of his natural life AND from and immediately after the decease of the survivor of them the said Charles Catchpole and Grace Gurney the said trustees or trustee for the time being of these presents shall stand and be possessed of and interested in the said trust monies stocks funds and securities and the dividends interest and annual produce thereof IN TRUST for all and every or such one or more exclusively of [*337] the others or other of the *children or child of the said intended marriage with such provision for their respective maintenance and if more than one in such shares and proportions and subject to such limitation and conditions over in favour of any others or other of the said children and in such manner (f) as the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by them sealed and delivered in the presence of and to be attested by two or more credible witnesses shall jointly direct or appoint AND in default of such joint direction or appointment and so far as any such joint direction or appointment if incomplete shall not extend as the survivor of them the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him or her respectively sealed and delivered in the presence of and to be attested by two or more credible

(e) See ante, p. 303.

(f) See ante, pp. 219, 211.

witnesses or by his or her last will or any codicil or testamentary writing to be by him or her respectively duly executed (and as to the said Grace Gurney notwithstanding any future coverture) shall direct or appoint AND in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend IN TRUST for all and every the children or child of the said intended marriage who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age with the consent of her or their parent or parents guardian or guardians for the time being and to be divided between or amongst the said children if more than one in equal shares as tenants in common and if there shall be but one such child who being a son shall live to attain the age of twenty-one years or being a daughter shall live to attain that age or marry under that age with such consent as aforesaid then the whole shall be in trust for that one or only child But no child taking any part of the said trust monies stocks funds and securities under any appointment to be made in exercise of any of the aforesaid powers shall be entitled to any share of the unappointed part of the said trust monies stocks funds *and securities without bringing his or her appointed share into [*338] hotchpot and accounting for the same accordingly (g) AND if there shall be no child or children of the said intended marriage who shall become entitled to the said trust monies stocks funds and securities under the trusts hereinbefore declared then the said trustees or trustee for the time being shall stand possessed of the said trust monies stocks funds and securities or so much thereof as shall not have been disposed of under the powers and authorities herein contained and the dividends interest and annual produce thereof (subject nevertheless to the trusts hereinbefore declared) UPON and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same that is to say If the said Charles Catchpole shall depart this life in the lifetime of the said Grace Gurney IN TRUST for the said Grace Gurney her executors administrators and assigns for her own benefit BUT IF the said Grace Gurney shall depart this life in the lifetime of the said Charles Catchpole then after the decease of the said Charles Catchpole and such failure of children as aforesaid UPON and for such trusts intents and purposes and in such manner as the said Grace Gurney by her last will or any codicil or testamentary writing to be by her duly executed notwithstanding her said intended coverture shall direct or appoint (h) AND in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend IN TRUST for the person or persons who under the statutes made for the distribution of the estates of intestates would at the decease of the said Grace Gurney be entitled to her personal estate in case she having survived the said Charles Catchpole had died possessed of the same intestate

(g) See ante, p. 211.

(h) See ante, p. 209.

and to be divided between or amongst the same persons if more than one in the shares in which the same would under the same statutes be divided between or amongst them PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that after the decease of the said Charles Catchpole and Grace Gurney and whilst any child or children of the said intended marriage being a son or sons shall be under the age of twenty-one [*339] years or being a daughter or daughters shall be under that *age and unmarried the said trustees or trustee for the time being of these presents do and shall apply the whole or such part as the said trustees or trustee for the time being shall think fit of the dividends interested and annual produce of the expectant or presumptive share of each such child in the said trust monies stocks funds and securities for or towards his or her maintenance and education or otherwise for his or her benefit and that the said trustees or trustee for the time being may either themselves or himself so apply the same or may pay the same to the guardian or guardians of such child for the purpose aforesaid without seeing to the application thereof (1) AND do and shall lay out and invest the surplus if any of the said interest dividends and annual produce in the names or name of the said trustees or trustee for the time being in any of the stocks funds or securities hereinbefore mentioned to be from time to time altered and varied for or into any other stocks funds and securities of a like nature as often as the said trustees or trustee shall think fit so that the same may accumulate by way of compound interest and the accumulations to be so made shall be added to the fund or respective funds from which the same shall have proceeded and be subject to the same trusts and provisions in every respect and so that the dividends interest and annual produce of each such accumulated fund may be subject to the provision hereinbefore contained for the maintenance and education at any subsequent period of minority of the child from whose expectant or presumptive share the same shall have proceeded PROVIDED ALSO and it is hereby agreed and declared that it shall be lawful for the said trustees or trustee for the time being of these presents during the joint lives of the said Charles Catchpole and Grace Gurney with their consent in writing and after the decease of either of them with the consent in writing of the survivor of them which consent shall be binding whether the said Grace Gurney shall be covert or sole and after the decease of such survivor at the discretion of the said trustees or trustee for the time being to raise and apply a sufficient part of the expectant share of any child of the said intended marriage in the said trust monies [*340] stocks funds and securities for or towards his or her advancement *in the world notwithstanding he or she shall not then have attained the age of twenty-one years or after he or she may have attained that age in the lifetime of the said Charles Catchpole and Grace Gurney or the survivor of them PROVIDED ALWAYS and it is hereby agreed and declared by and between

(1) See ante, p. 218.

the said parties hereto that it shall be lawful for the said trustees or trustee for the time being at any time or times during the lives or life of the said Charles Catchpole and Grace Gurney or the survivor of them with their his or her consent and approbation in writing signed with their his or her hands or hand to convert into money the whole or any part of the said stocks funds and securities and to lay out the monies arising thereby in the purchase of any freehold or copyhold estates in England or Wales of an estate of inheritance in fee simple in possession free from all incumbrances except quit rents and copyhold and customary dues and services (*k*) to be conveyed or surrendered to the said trustees or trustee for the time being their or his heirs and assigns UPON TRUST nevertheless with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them to be signified by writing signed with their his or her hands or hand during the lifetime of them or the survivor of them and after the decease of the survivor of them then at the discretion and of the proper authority of the said trustees or trustee for the time being of these presents to sell and dispose of the said estates which shall have been so purchased as aforesaid either by public auction or private contract in one lot or in parcels subject to such special conditions of sale and for such price or prices as to the said trustees or trustee for the time being shall seem reasonable with power at any public auction of the said premises or any of them to buy in the same or any of them and also to vary or rescind any contract for the sale of the same or any part thereof and either by public auction or private contract in one lot or in parcels to resell the same without responsibility for any loss to be occasioned thereby and to convey and assure the said premises which shall be sold to the purchaser or respective purchasers thereof or as he she or they respectively shall direct AND UPON *TRUST to apply the monies arising from such sale after payment of [*341] the costs charges and expenses attending the same Upon and for such and the same trusts intents and purposes as the monies so raised and laid out in the purchase of such estates were subject to before such purchase was made or would have been subject to if the same had not been laid out therein AND ALSO UPON TRUST in the meantime and until such estates shall be so resold to apply the rents and profits thereof in such manner as the interest dividends and annual produce of the monies laid out in the purchase thereof would have been applicable under the trusts hereinbefore declared in case such purchase had not been made IT BEING hereby agreed and declared that the estates to be purchased under this present power as aforesaid shall when so purchased be considered as money and be subject to such and the same trusts in all respects as the moneys laid out in the purchase thereof were subject to before such purchase was made or would have been subject to if the same had not been laid out therein PROVIDED ALWAYS and it is hereby

(*k*) See ante, p. 221.

agreed and declared by and between the said parties hereto that it shall be lawful for the trustees or trustee for the time being of the estates so to be purchased by virtue of such power as aforesaid with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them testified by some writing under their his or her hands or hand and after the decease of such survivor then at the discretion and of the proper authority of the said trustees or trustee by deed at any time or times to demise and lease the same estates or any of them or any part thereof to any person or persons whomsoever for any term of years not exceeding twenty-one years to take effect in possession and not by way of future interest at the best yearly rent that can be had or gotten for the same and without any fine or foregift for the making thereof and upon such other terms and conditions as the said trustees or trustee shall think fair and reasonable PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the trustees or trustee for the time being of these presents with the consent in writing of the said Charles Catchpole and Grace Gurney [*342] during their joint lives and after the decease *of either of them with the consent in writing of the survivor of them and after the decease of such survivor at the discretion of the said trustees or trustee to settle and ascertain in such manner as they or he shall deem expedient the amount of any monies properties or effects due to or claimed by them or him under these presents by virtue of the will of the said John Gurney deceased and also to pass and allow the accounts of the person or persons paying over or transferring the same monies properties or effects or any part thereof and to accept any monies properties or effects which the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall deem it expedient to accept in lieu of or satisfaction for the whole of the said premises hereby assigned and to give releases and discharges to the accounting party or parties for the same premises or any part thereof as fully and effectually as the trustees or trustee for the time being of these presents might or could do if they or he were absolute and beneficial owners or owner of such premises AND if any disputes or difficulties shall at any time arise in relation to the said premises hereby assigned or any part thereof it shall be lawful for the trustees or trustee for the time being of these presents if they or he shall think proper with such consent or at such discretion as aforesaid to refer any such disputes or difficulties to arbitration in the usual manner or otherwise to settle and adjust the same in such manner in all respects as the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall think proper PROVIDED ALSO and it is hereby further agreed that it shall be lawful for the trustees or trustee for the time being of these presents in their or his discretion to postpone or forbear the exercise and enforcement of all or any of the powers and remedies hereby vested in or which shall or may be exercisable by such trustees or trustee by virtue hereof

any thing herein contained or any rule at law or equity to the contrary notwithstanding PROVIDED ALSO and it is hereby agreed and declared by and between the said parties hereto that the receipts in writing of the trustees or trustee for the time being acting in the execution of the trusts or powers of these presents for any monies payable to them or him by virtue of these presents shall effectually discharge the person *or persons paying the same from all responsibility as to the misapplication or nonapplication thereof and from all obligation of seeing to the application thereof (l) AND ALSO that it shall be lawful for the trustees or trustee for the time being of these presents but during the lives of the said Charles Catchpole and Grace Gurney and the life of the survivor of them with their his or her consent in writing to accept other real securities for any part of the said trust funds which may be invested in real securities and the interest thereof in lieu of and as a substitution for the hereditaments or any part of the hereditaments comprised in any such security AND ALSO to discharge from any such security any part or parts of the hereditaments therein comprised and without which the said trustees or trustee shall deem the existing security or securities sufficient and every such acceptance of a new security and every release of all or any part of the hereditaments comprised in the existing securities shall be binding on all persons interested in the said trust funds and the interest thereof and the persons deriving title to the hereditament so released shall not be obliged to inquire into the sufficiency in point of value or title of the substituted or retained security or securities PROVIDED ALSO and it is hereby further agreed and declared by and between the said parties hereto that if the said trustees hereinbefore appointed or any or either of them or any future trustee or trustees to be appointed as hereinafter is mentioned shall happen to die or shall go to reside beyond the seas or shall be desirous of being discharged or shall decline or become incapable to act in the trusts or powers herein contained before the same shall be fully performed or otherwise satisfied then and in every such case it shall be lawful for the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them for the survivor of them and after the decease of such survivor for the surviving or continuing trustees or trustee for the time being of these presents or the acting executors or administrators of the last surviving or continuing trustee (and for this purpose a retiring trustee shall if willing to act in the execution of this *power be considered a continuing trustee) by any deed or deeds instrument or instruments in writing to be by them him or her sealed and delivered in the presence of and to be attested by two or more credible witnesses to substitute and appoint any other person or persons to be a trustee or trustees in lieu of the trustee or trustees so dying going to reside beyond the seas desiring to be discharged declining or becoming incapable to act as aforesaid (m) AND

(l) See ante, p. 222.

(m) See ante, p. 223.

THAT when any new trustee or trustees shall have been appointed as aforesaid all the said trust estates moneys and premises which shall be then vested in the trustees or trustee for the time being of these presents or in the heirs executors or administrators of the last surviving or continuing trustee shall with all convenient speed be conveyed assigned transferred and paid so as effectually to vest the same in the surviving or continuing trustees or trustee and such new or other trustee or trustees or if there shall be no surviving or continuing trustee then in such new trustees or trustee only upon the same trusts as are hereinbefore declared concerning the same or such of the same trusts as shall be subsisting or capable of taking effect AND it is hereby agreed and declared that every such new trustee shall in all things act and assist in the management and execution of the trusts and powers to which he shall be so appointed as effectually and with the same powers authorities exemptions and discretion as if he had been originally by these presents nominated a trustee for the purposes aforesaid PROVIDED ALSO and it is hereby agreed and declared by and between the said parties hereto that the trustees or trustee for the time being of these presents shall be chargeable respectively only with so much money as they respectively shall actually receive by virtue of the trusts hereby in them reposed notwithstanding their respectively joining with any co-trustees or co-trustee in the signature of receipts for the sake of conformity and shall not be answerable or accountable the one for the other or others of them or for any banker broker or other person with whom the said trust monies or any part thereof may be lodged for safe custody or for the insufficiency or deficiency of any stocks funds or securities *wherein the same may be invested in pursuance of these presents nor for any defect in title in any hereditaments or premises on the security whereof the said trust monies or any part thereof may be invested or which may be purchased under the power for that purpose hereinbefore contained nor for any other loss or damage which may happen in the execution of any of the trusts or powers herein expressed or in relation thereto unless the same shall happen through their own wilful default respectively (n) AND it is hereby further agreed and declared that it shall be lawful for the trustees or trustee for the time being of these presents out of the monies which shall come to their respective hands by virtue of these presents to retain to and reimburse themselves respectively and to allow to their co-trustees all such costs charges damages and expenses as they or any or either of them may sustain or incur in or about the execution of any of the trusts or powers herein expressed or in relation thereto IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

(n) See ante, p. 226.

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